Catholic University Law Review

Volume 38
Issue 4 *Summer 1989*

Article 5

1989

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Karen T. Grisez

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Recommended Citation
Karen T. Grisez, *Ross v. Oklahoma: A Reversal of the Reversible-Error Standard in Death-Qualification Cases*, 38 Cath. U. L. Rev. 881 (1989).
Available at: https://scholarship.law.edu/lawreview/vol38/iss4/5

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NOTES

ROSS V. OKLAHOMA: A REVERSAL OF THE REVERSIBLE-ERROR STANDARD IN DEATH-QUALIFICATION CASES

During the past twenty years, courts have grappled with the issue of whether prospective jurors should be excluded from service on juries in capital cases because of their personal views on the death penalty. These cases have arisen both where defense counsel sought to strike potential jurors who indicated that they would automatically vote to impose the death penalty if the defendant were convicted,[1] and more commonly, where prosecutors have attempted to eliminate venirepersons who stated that their reservations about the death penalty could affect their decision either on the question of guilt or at the sentencing phase.[2]

Defendants facing the death penalty have advanced several different arguments in seeking reversal of their convictions.[3] The claims have been couched most often in either sixth amendment or fourteenth amendment terms. The appeals alleging sixth amendment violations usually involve claims of judicial error in either the grant or refusal of a challenge for cause or the prosecution's improper use of peremptory challenges.[4] Those charging fourteenth amendment violations claim that the court denied the defendant his due process or equal protection rights under the law.[5] State courts and federal circuit courts have adopted widely inconsistent positions on

1. *See, e.g.,* Ross v. Oklahoma, 108 S. Ct. 2273, 2276 (1988).

2. *See, e.g.,* Witherspoon v. Illinois, 391 U.S. 510, 512-13 (1968).

3. *See id.* at 516-17 (arguing that death-qualified juries are conviction-prone); Keeten v. Garrison, 742 F.2d 129, 133 (4th Cir. 1984) (arguing that death-qualified juries deprive defendants of a jury composed of a fair cross-section of the community), *cert. denied,* 476 U.S. 1153 (1986); Smith v. Balkcom, 660 F.2d 573, 583 (5th Cir. 1981) (arguing that death-qualified juries have detrimental effects on defendants' constitutional rights), *cert. denied,* 459 U.S. 882 (1982); Spinkellink v. Wainwright, 578 F.2d 582, 596-97 (5th Cir. 1978) (also advancing the fair cross-section argument), *cert. denied,* 440 U.S. 976 (1979); United States *ex rel.* Clark v. Fike, 538 F.2d 750, 761 (7th Cir. 1976) (also advancing the conviction-prone argument), *cert. denied,* 429 U.S. 1064 (1977).

4. *See, e.g., Ross,* 108 S. Ct. 2273; Gray v. Mississippi, 481 U.S. 648 (1987); Wainwright v. Witt, 469 U.S. 412 (1985); Adams v. Texas, 448 U.S. 38 (1980); Davis v. Georgia, 429 U.S. 122 (1976); *Witherspoon,* 391 U.S. 510.

5. *See, e.g., Ross,* 108 S. Ct. at 2275; *Gray,* 481 U.S. at 657; Lockhart v. McCree, 476 U.S. 162, 165 (1986); *Adams,* 448 U.S. at 40-41 (1980); *Witherspoon,* 391 U.S. at 518. All of

these issues.[6]

The United States Supreme Court has also considered numerous jury selection cases.[7] The Court has attempted to identify acceptable procedures for selecting a jury. The standards for challenges for cause and the appropriate use of peremptory challenges have evolved from the progression in the Court's decisions. However, the type of error in jury selection that mandates the reversal of a conviction remains unclear.[8] The two most recent Supreme Court rulings relating to errors in the jury selection process have enunciated completely different tests for determining whether convictions in capital cases must be reversed.

In its 1987 decision in *Gray v. Mississippi,*[9] the Court declared that the improper exclusion of a juror for cause constituted reversible constitutional error which could not be submitted to mere harmless error review.[10] David Randolph Gray was convicted of felony murder and sentenced to death for a stabbing committed during a kidnapping.[11] During the jury selection process, the trial judge erroneously excused a juror for cause.[12] When considering Gray's challenge to the composition of the jury, the Supreme Court identified the proper inquiry as whether the judge's error could have affected the composition of the jury as a whole.[13]

While the Supreme Court had apparently established a clear view of the appropriate test in *Gray,* it almost immediately changed course with its opinion in *Ross v. Oklahoma.*[14] Bobby Lynn Ross had also been sentenced to death for murder.[15] Defense counsel had been forced to exercise a peremptory challenge to correct the trial judge's error in failing to excuse a juror for cause.[16] In *Ross,* Chief Justice Rehnquist stated for the majority that the language in *Gray* was not meant to be applied literally,[17] and held instead that any claim that a jury was not impartial must focus not on the juror who

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these cases also include sixth amendment claims, so the sixth and fourteenth amendment claims will generally be discussed together *infra.*

6. *See infra* notes 67-102 and accompanying text.

7. *See* cases cited *supra* notes 4-5; *see also* Logan v. United States, 144 U.S. 263 (1892).

8. *See infra* notes 151-203 and accompanying text.

9. 481 U.S. 648.

10. *Id.* at 660-61.

11. *Id.* at 651, 656.

12. *Id.* at 658-59.

13. *Id.* at 665 (quoting Moore v. Estelle, 670 F.2d 56, 58 (5th Cir.), *cert. denied,* 458 U.S. 1111 (1982)). The Court framed the test as "whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error." *Id.*

14. 108 S. Ct. 2273 (1988).

15. *Id.* at 2276.

16. *Id.*

17. *Id.* at 2278.

was excused, but rather on the jurors who ultimately sat.[18] In affirming Ross' conviction and death sentence,[19] the Court completely side-stepped the critical inquiry identified in *Gray:* whether the jury composition as a whole had been affected.

This Note first presents the history and development of both challenges for cause and peremptory challenges. It then focuses on court cases that have considered the exclusion of jurors based on their attitudes toward the death penalty, and examines the divergent standards for reversal which those courts adopted. Next, this Note compares and contrasts the United States Supreme Court decisions in *Gray* and *Ross* and addresses how well they maintain the availability of both types of challenges. Finally, this Note concludes that although the *Ross* decision is not completely without foundation, the *Gray* decision is more faithful to the tradition of providing peremptory challenges to the accused and affords better protection of the constitutional rights of defendants in capital cases.

I. HISTORY OF CHALLENGES FOR CAUSE AND PEREMPTORY CHALLENGES

The sixth amendment to the United States Constitution guarantees all criminal defendants the right to a trial by an impartial jury.[20] The tools of challenges for cause and peremptory challenges were developed to help secure that impartial jury.[21]

A. Challenges for Cause

Challenges for cause originated in the English common law and were later adopted in the United States.[22] Counsel for either side generally asks the court to excuse a juror for cause if that juror's responses to voir dire questioning indicate that he cannot be impartial.[23] Challenges for cause permit the rejection of jurors on a narrowly specified, provable, and legally cognizable basis of partiality.[24] Their use will theoretically eliminate the most obvi-

18. *Id.* at 2277.

19. *Id.* at 2275, 2280.

20. U.S. CONST. amend. VI.

21. J. M. VAN DYKE, JURY SELECTION PROCEDURES 139-41 (1977).

22. 47 AM. JUR. 2D *Jury* § 213 (1969) (*see also* J. PROFFATT, A TREATISE ON TRIAL BY JURY §§ 166-198 (1877); M. LESSER, HISTORICAL DEVELOPMENT OF THE JURY SYSTEM (1894) (cited therein)). In 1305, the Ordinance for Inquests provided that when any representative of the King wanted to challenge a juror, a cause certain had to be assigned. 33 Edw. 1, Stat. 4 (1305), (cited in Swain v. Alabama, 380 U.S. 202, 213 (1965)).

23. *Project: Criminal Procedure,* 74 GEO. L.J. 751, 788 (1986) [hereinafter *Project*]; 47 AM. JUR. 2D *Jury* § 213 (1969).

24. Swain v. Alabama, 380 U.S. 202, 220 (1965).

ously biased venirepersons: those who would fall at the far ends of the spectrum in the search for impartiality. They may also be used to eliminate prospective jurors based on a perceived lack of competency to serve.[25] Challenges for cause may be unlimited in number but they must always be explained.[26] The trial court is afforded broad discretion in deciding whether to excuse jurors for cause. Therefore, the denial of such challenges has rarely been the basis for reversal.[27]

B. Peremptory Challenges

Peremptory challenges differ from challenges for cause in that they need not be based on articulable reasons, but are purely discretionary.[28] Lawyers may use peremptory challenges to exclude jurors perceived as biased for reasons that cannot be as clearly identified.[29] Peremptory challenges permit a lawyer to play his hunches by striking potential jurors who could not be excluded for cause.[30] The major difference between the two types of challenges involves the degree of partiality needed to justify their use. Challenges for cause must be explained to the trial judge's satisfaction.[31] Peremptory challenges by their nature may be used in an arbitrary and capricious manner, and are meant to be exercised without control.[32]

Like challenges for cause, peremptory challenges also have a long-standing history in the American judicial system,[33] even though they are not mandated by the Constitution.[34] The Supreme Court has recognized that the right to challenge jurors historically is based on the common law along with

25. *See* 28 U.S.C. § 1865 (1982) (competency standards); *see also* Blume, *Jury Selection Analyzed,* 42 MICH. L. REV. 831 (1944).

26. Batson v. Kentucky, 476 U.S. 79, 127 (1986) (Burger, C.J., dissenting). Some possible bases for challenges for cause may include "having served on the grand jury that indicted the defendant, being related to a party [to the litigation], or having a state of mind that would prevent the venireperson from being impartial." Comment, *Wainwright v. Witt and Death-Qualified Juries: A Changed Standard But an Unchanged Result,* 71 IOWA L. REV. 1187, 1187 (1986); Note, *Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law,* 44 U. PITT. L. REV. 673, 676 n.22 (1983) [hereinafter *Survey*].

27. *Project, supra* note 23, at 788-89.

28. *Swain,* 380 U.S. at 220.

29. *Id.*

30. *Survey, supra* note 26, at 676 (citing Younger, *Unlawful Peremptory Challenges,* 7 LITIGATION 23 (1980)).

31. *See Project, supra* note 23, at 788-89. It has even been suggested that the judge should excuse jurors for cause, and counsel should only have to request a challenge for cause if the judge does not excuse the juror on his own. 3 A.B.A. STANDARDS FOR CRIMINAL JUSTICE, standard 15-2.5 (2d ed. 1980).

32. *Swain,* 380 U.S. at 219-20.

33. *Survey, supra* note 26, at 674-75. The development of the use of peremptory challenges in the United States clearly paralleled that of the English common law. *Id.* at 675.

34. Stilson v. United States, 250 U.S. 583, 586 (1919).

the right to trial by jury, and has always been considered essential to the fairness of jury trials.[35]

The right to peremptory challenges is not solely a judicial creation; it has received broad legislative support as well. The First Congress recognized the criminal defendants' common law privilege of peremptory challenges.[36] In 1865, Congress extended the right to use peremptory challenges to prosecutors in federal courts.[37] Modern Congresses have demonstrated a commitment to maintaining the availability of peremptory challenges by providing for them in both civil and criminal federal cases.[38] State legislatures have also acknowledged the need for peremptory challenges. By about 1900, many state legislatures had firmly established the government's right to exercise peremptory challenges by enacting statutes authorizing their use by both the prosecutor and the defendant.[39] Today, the peremptory challenge is a statutory tool that supplements the challenge for cause.[40] It helps satisfy both litigants as to the composition of the jury because they have an active role in shaping it themselves.[41]

The rationale behind the development of both types of challenges and the appropriate circumstances for their use has become particularly important in death penalty cases. The role of challenges for cause and peremptory challenges in jury selection in capital cases has generated considerable Supreme Court action with no definite resolution.

II. EARLY "DEATH-QUALIFICATION" CASES

A. The Early Years

The practice of identifying and excluding prospective jurors whose views on the death penalty would prohibit them from fulfilling their duty in a capital case is generally known as "death-qualification."[42] Death-qualification of

35. Pointer v. United States, 151 U.S. 396, 408 (1894); Lewis v. United States, 146 U.S. 370, 376 (1892); *accord* Swain v. Alabama, 380 U.S. 202, 219 (1965).

36. *Survey, supra* note 26, at 675.

37. *Id.* (citing Act of Mar. 3, 1865, ch. 86, § 2, 13 Stat. 500) (current version at FED. R. CRIM. P. 24(b)).

38. *See* 28 U.S.C. § 1870 (1982) and FED. R. CRIM. P. 24(b). *See also* H.R. REP. NO. 1076, 90th Cong., 2nd Sess., 5-6, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 1792, 1795.

39. *Survey, supra* note 26, at 675.

40. *See generally id.* at 675-76.

41. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 552-53 (1975).

42. Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data,* 8 LAW & HUM. BEHAV. 7, 7 (1984). The term "death-qualified" has been used to describe juries selected by several different processes. *See, e.g.,* Schnapper, *Taking Witherspoon Seriously: The Search for Death-Qualified Jurors,* 62 TEX. L. REV. 977, 980

juries existed as early as 1820.[43] Both courts and legislatures[44] have since considered the issue of whether potential jurors' personal beliefs about capital punishment can properly serve as a basis for excluding them from jury service. Many state rules or statutes authorize the exclusion of jurors whose views on the death penalty would in some way interfere with their ability to be impartial.[45] The lack of impartiality sufficient to justify exclusion of a prospective juror could be one of two possible types. A juror could be excluded if his awareness that the death penalty could be imposed if the defendant were convicted would affect his determination on the issue of guilt.[46] He could also be excluded if he could decide fairly as to guilt or innocence, but his views on capital punishment would cause him to be unable to apply the law at the sentencing stage.[47] Although both supporters and opponents of the death penalty could theoretically be excluded from jury service based on their beliefs regarding capital punishment, the jurors opposed to the death penalty are more frequently excluded.[48]

In its 1892 decision in *Logan v. United States,* the Supreme Court expressly approved the practice of death-qualifying juries in federal courts,

(1984) (the prosecution successfully challenged for cause jurors who could not be excluded under *Witherspoon*); White, *Death Qualified Juries: The "Prosecution-Proneness" Argument Reexamined,* 41 U. PITT. L. REV. 353, 354 (1980) (excluding all those who stated they would automatically refuse to impose the death penalty); Comment, *Constitutional Law: Does "Death Qualification" Spell Death for the Capital Defendant's Right to an Impartial Jury?,* 26 WASHBURN L.J. 382, 382 (1987) (excluding prospective jurors who are unalterably opposed to the death penalty).

43. Comment, *supra* note 42, at 383-84 & n.17.

44. Many states have enacted statutes authorizing exclusions for cause based on jurors' views on the death penalty. *See infra* note 45. Courts have then attempted to decide whether the statutory schemes are constitutional.

45. *See, e.g.,* ALA. CODE § 12-16-152 (1986); ARK. STAT. ANN. § 16-33-304 (1987); CAL. PENAL CODE § 1074.8 (West 1985); FLA. STAT. ANN. § 913.13 (West 1985); IDAHO CODE § 19-2020-9 (1987); LA. CODE CRIM. PROC. ANN. art. 798(2) (West 1981); MO. REV. STAT. § 546.130 (1987); N.Y. CRIM. PROC. LAW § 270.20 (McKinney 1982); N.C. GEN. STAT. § 15A-1212(8) (1988); OHIO REV. CODE ANN. § 2945.25(c) (Anderson 1987); TEX. CRIM. PROC. CODE ANN. §§ 35.13, 35.16(b)(1) (Vernon 1988). The Supreme Court has declared some of these statutes unconstitutional. *See, e.g.,* TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974) (cited in Adams v. Texas, 448 U.S. 38, 43 (1980)). However, the Oklahoma case law requiring defendants to use a peremptory challenge if a trial judge erroneously fails to excuse a juror through a challenge for cause was left in place by the Court. *See infra* notes 178-203 and accompanying text.

46. *See* Comment, *supra* note 26 at 1188 n.8 (listing several such statutes); Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?,* 39 TEX. L. REV. 545, 550 n.25 (1961) (citing N.Y. CODE CRIM. PROC. § 377 and Knowlton, *Problems of Jury Discretion in Capital Cases,* 101 U. PA. L. REV. 1099, 1106 (1953)).

47. *See, e.g.,* Witherspoon v. Illinois, 391 U.S. 510, 522-23 n.21 (1968) (discussing both types of impartiality); Adams v. Texas, 448 U.S. 38, 44-45 (1980) (same).

48. Comment, *supra* note 26, at 1188.

noting that every court which had addressed the issue at that time had accepted it.[49] The practice of death-qualifying juries under *Logan* continued virtually unchanged for more than half a century.

B. Witherspoon v. Illinois

Death-qualification became an issue again in 1968, when the Supreme Court granted certiorari in the case of *Witherspoon v. Illinois*[50] to decide whether the Constitution permitted a state to execute a man based on the verdict returned by a death-qualified jury.[51] Witherspoon had been convicted of murder and sentenced to death.[52] Pursuant to an Illinois statute, the trial judge excluded every person who stated during voir dire that he was opposed to capital punishment or had conscientious "scruples" against it.[53] Witherspoon contended that a state could not give a jury selected in such a manner the power to determine guilt.[54] He offered three statistical studies in support of the proposition that death-qualified juries were biased in favor of the prosecution.[55]

Despite the proffered statistics, the Supreme Court found that Witherspoon had not conclusively proven that a jury assembled through the use of death-qualification was predisposed toward conviction.[56] However, the Court did accept Witherspoon's argument that a jury constituted in such a manner was predisposed to impose the death penalty.[57]

The Court pointed out that *Witherspoon* was not a case in which jurors

49. 144 U.S. 263, 298 (1892).

50. 389 U.S. 1035 (1968).

51. Witherspoon v. Illinois, 391 U.S. 510, 513 (1968).

52. *Id.* at 512.

53. *Id.* at 514-15. At the time of Witherspoon's trial, the pertinent statute provided: "[i]n trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." *Id.* at 512 & n.1 (citing ILL. REV. STAT. c. 38, § 743 (1959)). The term "scruples" had become a term of art used in death-qualification cases since *Logan*, 144 U.S. at 298. It is generally used to mean objections, concerns, or reservations about capital punishment that fall short of total opposition to it.

54. 391 U.S. at 516.

55. *Id.* at 517 & n.10. The complete studies were not even submitted to the Court. One of them, by H. Zeisel, was not yet published, but a preliminary summary of the results was cited in the petition for writ of certiorari. *Id.* at 517 n.10. Two others, one by W.C. Wilson, Ph.D., and the other by F.J. Goldberg, D.Ed., were cited in the Petitioner's Brief. *Id.* For more detail on the social science studies, see Comment, *supra* note 42, at 384 n.25.

56. *Witherspoon*, 391 U.S. at 517-18. The Court did not say that Witherspoon's argument could never succeed, but only that the data he had introduced in this case were too tentative to establish firmly the proposition at that time. *Id.* For a later discussion which finds statistical studies demonstrating conviction-prone juries to be much more credible, see the dissent in Lockhart v. McCree, 476 U.S. 162, 187-92 (1986) (Marshall, J., dissenting).

57. *Witherspoon*, 391 U.S. at 521.

were excluded if they indicated that their views against the death penalty would prevent them from making an impartial decision as to guilt, nor a case where jurors were excused if they indicated that they could *never* impose capital punishment.[58] The Court noted that at Witherspoon's trial, thirty-nine prospective jurors had been excluded for merely expressing some conscientious or religious scruples against the infliction of the death penalty, although they had never been asked whether they would be able to apply the law impartially regardless of those views.[59] The *Witherspoon* Court dismissed its own earlier acceptance of the death-qualification practice in *Logan* as dicta,[60] and concluded that where all persons opposed to the death penalty or having scruples concerning it had been eliminated from the panel, the jury could not adequately represent the community's views on the ultimate question of life or death.[61] Just as a state cannot let a jury "organized to convict" determine guilt or innocence, it cannot permit a jury "organized to return a verdict of death" to make the decision of whether to impose the death penalty.[62] Therefore, although the Court did not reverse Witherspoon's conviction, it did overturn his death sentence.[63]

The most significant legacy of *Witherspoon* arose from a footnote in the decision. The Court asserted that a state *could* execute a defendant who was sentenced to death by a jury from which the only venirepersons excluded for cause were those who expressed an unmistakable intention to vote automatically against the death penalty regardless of the evidence, or who stated that their attitude toward the death penalty would prevent them from being impartial on the issue of guilt.[64]

The *Witherspoon* Court identified a two part test for exclusion of jurors. As a threshold question, the first part of the test required the judge to decide whether a juror's views on the death penalty would lead to one of two possible results: the juror would automatically vote against the death penalty, or

58. *Id.* at 513-14.
59. *Id.* at 514-15.
60. *Id.* at 523 n.22.
61. *Id.* at 519-20.
62. *Id.* at 521.
63. *Id.* at 522-23.
64. *Id.* at 522 n.21. The exact language appearing in the *Witherspoon* footnote has been extensively quoted in subsequent decisions and in the literature. The language stated that the court could exclude for cause only those venirepersons

> 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.*

Id.

the juror would not be impartial as to guilt.[65] If either of those results could occur, the second part of the *Witherspoon* test established the level of proof necessary for a judge to exclude a venireperson. The *Witherspoon* Court stated that jurors could be excluded only if they made it *unmistakably clear* that their death penalty views would lead to one of the two possible results set forth above.[66]

C. *Responses to* Witherspoon — *Other Approaches to Death-Qualification*

Following the Supreme Court's decision in *Witherspoon,* which appeared to identify circumstances in which death-qualification of jurors would be permitted, defendants in capital cases mounted challenges to death-qualified juries in the lower courts on other grounds. In the late 1970's and early 1980's, state courts,[67] federal circuit courts of appeal,[68] and the United States Supreme Court[69] continued the effort to define the circumstances in which a death-qualified jury was constitutionally permissible.

1. *The Conviction-Prone Argument*

In one case, *United States ex rel. Clarke v. Fike,*[70] the defendant appealed his conviction to the United States Court of Appeals for the Seventh Circuit, advancing an argument similar to that which Witherspoon had presented earlier.[71] He alleged that a death-qualified jury was biased in favor of the prosecution and was therefore "conviction-prone."[72] That defendant presented several social science studies in support of his claim which were similar to those that had been submitted in *Witherspoon,* but like Witherspoon, failed to persuade the court to reverse his conviction on these grounds.[73] The Supreme Court indicated its unwillingness to change its po-

65. *Id.*

66. *Id.*

67. *See, e.g.,* Adams v. State, 577 S.W.2d 717 (Tex. Civ. App. 1979), *rev'd,* 448 U.S. 38 (1980); Davis v. State, 236 Ga. 804, 225 S.E.2d 241 (1976), *rev'd,* 429 U.S. 122 (1976).

68. *See, e.g.,* Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984), *cert. denied,* 476 U.S. 1153 (1986); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), *cert. denied,* 459 U.S. 882 (1982); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), *cert. denied,* 440 U.S. 976 (1979); United States *ex rel.* Clark v. Fike, 538 F.2d 750 (7th Cir. 1976), *cert. denied,* 429 U.S. 1064 (1977).

69. Davis v. Georgia, 429 U.S. 122 (1976).

70. 538 F.2d 750 (7th Cir. 1976), *cert. denied,* 429 U.S. 1064 (1977).

71. *Id.*

72. *Id.* at 761.

73. *Id.* at 762. The petitioner submitted three new studies. One was a Harris poll, and one rehashed data from an earlier study. The Court discounted both studies. *Id.* The third study the court considered was based on the responses of a small group of people who were asked hypothetical questions. *Id.* The Court of Appeals for the Seventh Circuit characterized

sition on this issue by refusing to grant certiorari.[74] By refusing to take a case advancing arguments similar to Witherspoon's, the Court forced capital defendants to formulate alternative challenges to the death-qualification practice.

2. The Representative Cross-Section Argument

In *Taylor v. Louisiana,*[75] the Supreme Court recognized that the American jury trial concept contemplates a jury drawn from a fair cross-section of the community, and invalidated a jury selection statute that effectively eliminated women from jury venires.[76] In 1976, the Court decided the case of *Davis v. Georgia,*[77] in which a fair cross-section claim was made against a death-qualified jury. Davis had been convicted of murder and sentenced to death by a jury from which one member had been improperly excluded under the *Witherspoon* standard.[78] The Supreme Court of Georgia acknowledged that the juror had been erroneously excluded,[79] but nevertheless affirmed the conviction on the ground that the defendant failed to demonstrate systematic exclusion of a group of jurors representing a cross-section of the community.[80] On appeal, the United States Supreme Court reversed, holding that the representative cross-section inquiry was not the test established in *Witherspoon.*[81] The Court reiterated the *Witherspoon* rule: If a venireperson had been improperly excluded for cause, any subsequently imposed death penalty could not stand.[82]

Justice Rehnquist dissented, arguing that the *Witherspoon* test did not necessarily lead to the result the majority reached.[83] He attacked the decision on two grounds. First, he suggested that *Witherspoon* did not require

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the study as not increasing empirical evidence sufficiently on the "conviction prone" issue to overcome the Supreme Court's objection to existing data as "fragmentary and tentative." *Id.*

74. 429 U.S. at 1064.

75. 419 U.S. 522 (1975). The Court later made the same finding with regard to a slightly different statutory scheme in Duren v. Missouri, 439 U.S. 357, 365-70 (1979).

76. 419 U.S. at 538. The Louisiana statute overturned in *Taylor* excluded all women from jury service unless a particular woman indicated her desire to participate. *Id.* at 523. The Missouri statute invalidated in *Duren* automatically excused women from jury service if they either mailed in a card requesting an exemption or simply failed to appear on the scheduled date. *Duren,* 439 U.S. at 362.

77. 429 U.S. 122 (1976) (per curiam).

78. *Id.* at 122. The juror in question was excluded even though her objections to the death penalty were not strong enough to fulfill *Witherspoon's* "unmistakably clear" standard. Davis v. State, 236 Ga. 804, 225 S.E.2d 241, 243-44 (1976), *rev'd,* 429 U.S. 122 (1976).

79. 429 U.S. at 122.

80. *Id.* at 122-23 (quoting Davis v. State, 236 Ga. at 809-10, 225 S.E.2d at 244-45).

81. 429 U.S. at 123.

82. *Id.*

83. *Id.* at 123 (Rehnquist, J., dissenting).

per se reversal when only one juror was improperly excluded.[84] He asserted that in such a case, the Court should have considered the harmless error test established in *Chapman v. California.*[85] Justice Rehnquist believed that if Davis' conviction and sentencing were submitted to harmless error review, no reversal would be required.[86] Second, he argued that it was not totally clear that the juror in question *had* been improperly excluded under *Witherspoon.*[87] The problem, according to Justice Rehnquist, was that the juror had not been questioned sufficiently to make a determination as to whether she could be excluded.[88]

Justice Rehnquist's dissent in *Davis* represents the first assertion of the utility of the harmless error test in conjunction with the *Witherspoon* standard in a death-qualification case. Nevertheless, the majority rejected Justice Rehnquist's position and ruled the representative cross-section test inapplicable in the death-qualification context.[89] However, *Davis* was not the end of the fair cross-section attack on death-qualified juries.

In the late 1970's, two circuit courts of appeal also considered allegations of sixth amendment violations based on prior Supreme Court decisions requiring jury venires to be composed of a fair cross-section of the community. In *Spinkellink v. Wainwright,*[90] the United States Court of Appeals for the Fifth Circuit considered a claim that the practice of death-qualifying juries violated a defendant's sixth amendment right to a trial by a jury consisting of a fair cross-section of the community. The court ruled that even if the death-qualification process violated the fair cross-section requirement, the state's overriding interest in having a single jury decide on both guilt and sentencing in capital cases justified any such violation.[91]

The United States Court of Appeals for the Fourth Circuit considered a similar fair cross-section claim in *Keeten v. Garrison.*[92] Unlike the Fifth Cir-

84. *Id.* at 123-24.

85. *Id.* (citing Chapman v. California, 386 U.S. 18 (1967)). The *Chapman* rule articulates that a federal constitutional error cannot be held harmless unless the court declares a belief that it was harmless beyond a reasonable doubt. 386 U.S. at 24. The Court stated that its goal was the same as in Fahy v. Connecticut, 375 U.S. 85 (1963), where the beneficiary of a constitutional error would have to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. *Chapman,* 386 U.S. at 23-24.

86. Davis v. Georgia, 429 U.S. at 124 (Rehnquist, J., dissenting).

87. *Id.*

88. *Id.* Justice Rehnquist suggested in his dissent that a hearing could still be held to question the excluded juror in order to determine whether or not she was really excludable for cause. *Id.*

89. 429 U.S. at 123.

90. 578 F.2d 582 (5th Cir. 1978), *cert. denied,* 440 U.S. 976 (1979).

91. *Id.* at 597.

92. 742 F.2d 129 (4th Cir. 1984), *cert. denied,* 476 U.S. 1153 (1986).

cuit, the *Keeten* court found no possible sixth amendment violation in the exclusion of jurors opposed to the death penalty.[93] Specifically, the court determined that death penalty opponents were not a distinct community group.[94] The court further found that the state's interest in seating a competent, impartial jury took precedence over the defendant's right to be tried by a non-death-qualified jury.[95] Once again, criminal defendants were unsuccessful in abolishing the practice of death-qualifying juries. A new approach was still needed.

3. The Detrimental Effects Argument

Just a few years after its decision in *Spinkellink,*[96] the Court of Appeals for the Fifth Circuit, in *Smith v. Balkcom,* considered a case in which the defendant claimed that the death-qualification of jurors should be found unconstitutional because it had serious detrimental effects on a jury.[97] This claim was based on the Supreme Court's earlier decision in *Ballew v. Georgia.*[98] *Ballew* concerned the constitutionality of a statute permitting five-person juries in criminal cases.[99] The Court held that five-person juries violated the defendant's right to a trial by jury because of the detrimental effects of a reduction in the number of jurors.[100] The Fifth Circuit rejected the defendant's detrimental effects claim, reasoning that *Ballew* merely set a minimum for jury size and did not find that any combination of factors detrimental to jury functions could constitute a sixth amendment violation.[101] This same argument concerning violation of the right to a trial by jury has consistently failed in other federal courts as well as state courts.[102]

The various arguments that these defendants offered in support of their quest for reversal of death penalty convictions met with inconsistent results in both state courts and federal circuit courts. Because the Supreme Court

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93. *Id.*

94. *Id.* at 133 (citing Lockett v. Ohio, 438 U.S. 586, 596-97 (1978); Adams v. Texas, 448 U.S. 38, 45 (1980)).

95. 742 F.2d at 134.

96. 578 F.2d 582 (5th Cir. 1978), *cert. denied,* 440 U.S. 976 (1979). *See infra* notes 90-91 and accompanying text.

97. 660 F.2d 573, 583 (5th Cir. 1981), *cert. denied,* 459 U.S. 882 (1982).

98. 435 U.S. 223 (1978).

99. *Id.* at 224.

100. *Id.* at 239. The specific detrimental effects the Court recognized were that smaller juries: led to inaccurate fact finding, *id.* at 232; resulted in a jury less representative of the community by tending to exclude minorities, *id.* at 236-38; failed to provide adequately for the counterbalancing of individual biases, *id.* at 233-34; and tended to produce inaccurate and inconsistent verdicts, *id.* at 234-35. *See generally,* Comment, *supra* note 42, at 390-91.

101. 660 F.2d at 584.

102. Comment, *supra* note 42, at 392 & n.68.

denied certiorari in most of these cases, no clear national standard emerged concerning the practice of death-qualifying jurors.

III. The Supreme Court Returns to Death-Qualification Cases — A Search for Standards in the 1980's

In the 1980's, the Supreme Court considered several death-qualification cases.[103] Although they generally followed from the *Witherspoon* decision, a clearly articulable standard on the issue of excluding jurors because of their views on capital punishment still did not emerge.[104]

A. Adams v. Texas

In *Adams v. Texas,*[105] the defendant sought reversal of his murder conviction and death sentence based on an inconsistency between a Texas statute and the *Witherspoon* standard.[106] At the time of Adams' trial, the Texas jury selection scheme in capital cases used only one jury in a bifurcated proceeding, where guilt was determined first, and sentencing pursued in a separate phase.[107] The Texas statute required the trial judge to advise prospective jurors that if convicted, the defendant would be sentenced to either life imprisonment or death.[108] The jurors were then required to take an oath that the possibility of the death penalty would not affect their deliberations on the facts.[109] Adams argued that jurors who had refused to take the oath and therefore had been excluded from jury service pursuant to the statute, could not have been excluded under the *Witherspoon* rule.[110]

The Supreme Court granted certiorari in *Adams* to decide two questions.[111] The first was whether the *Witherspoon* rule applied to bifurcated trials.[112] The Court held that it did.[113] The second was whether the exclu-

103. *See infra* notes 105-49 and accompanying text.
104. *Id.*
105. 448 U.S. 38 (1980).
106. *Id.* at 42-43.
107. *Id.* at 40-41.
108. *Id.* at 43. The Court referred to Tex. Penal Code Ann. § 12.31(b) (Vernon 1974) which provided:

> [p]rospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

Id.
109. 448 U.S. at 42.
110. *Id.*
111. *Id.* at 43.
112. *Id.*
113. *Id.* at 45. The Texas statute provided that following a verdict of guilty, a sentencing

sion of jurors that had occurred in this case, consistent with the Texas statute, violated *Witherspoon.*[114] Because the Texas statute required the exclusion of jurors on broader grounds than those *Witherspoon* permitted, the *Adams* Court found, with reference to the second issue, that several jurors had been impermissibly excluded.[115] However, the *Adams* Court, apparently attempting to restate the *Witherspoon* rule, actually articulated a different standard.

Witherspoon had not permitted exclusion of jurors unless they made it *unmistakably clear* that either they would automatically vote against the death penalty regardless of the evidence, or that their attitudes about the death penalty would prevent them from being impartial as to guilt.[116] However, the *Adams* Court referred to *Witherspoon* and the line of cases following it as standing for the proposition that a juror could not be challenged for cause unless his views on capital punishment would prevent or substantially impair the performance of his duties as a juror.[117]

The *Witherspoon* language about "automatically vot[ing] against the death penalty"[118] is quite different from the *Adams* "prevent or substantially impair" standard.[119] Without apparently meaning to do so, the *Adams* Court misstated the actual standard for exclusion that *Witherspoon* had established, and did not address the issue of the quantum of proof necessary to exclude at all.[120] The *Adams* decision generated confusion as to whether the Court intended the "unmistakably clear" part of the *Witherspoon* test to remain viable. Consequently, divergent views emerged regarding the proper meaning of *Witherspoon* after the *Adams* decision.[121]

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proceeding occurs. Evidence can then be introduced regarding mitigating or aggravating circumstances. The jury must then answer three specific statutory questions. The judge is required to impose a sentence of death or life imprisonment based strictly on the jury's answers to the questions. *Id.* at 40-41. The *Adams* Court found that this procedure made the jury's role more limited than under the Illinois statute, but that the *Witherspoon* rule nevertheless applied. *Id.* at 46-47 & n.4.

114. *Id.* at 43. *See also id.*, n.2 regarding the Fifth Circuit's ruling concerning the same statute.

115. *Id.* at 48-50.

116. *Witherspoon,* 391 U.S. 510, 522 n.21.

117. 448 U.S. at 45.

118. 391 U.S. at 522 n.21.

119. 448 U.S. at 45.

120. For another interpretation of what occurred in *Adams,* see Comment, *supra* note 26, at 1195.

121. *See, e.g.,* Briley v. Bass, 750 F.2d 1238, 1246 (4th Cir. 1984) (applying *Witherspoon* only and not mentioning *Adams*), *cert. denied,* 470 U.S. 1088 (1985); Monroe v. Blackburn, 748 F.2d 958, 961 (5th Cir. 1984) (same), *cert. denied,* 476 U.S. 1145 (1986); Green v. Zant, 738 F.2d 1529, 1534 (11th Cir.) (same), *cert. denied,* 469 U.S. 1098 (1984); Willie v. Maggio, 737 F.2d 1372, 1388 (5th Cir.) (same), *cert. denied,* 469 U.S. 1002 (1984); Turner v. Bass, 753 F.2d 342, 346-47 (4th Cir. 1985) (relying on *Witherspoon* and *Adams,* but not applying the

B. Wainwright v. Witt

The Supreme Court recognized that confusion as to the proper application of *Witherspoon* existed in the lower courts, and therefore granted certiorari in the case of *Wainwright v. Witt.*[122] Following his conviction for first degree murder and imposition of the death sentence, Witt alleged *Witherspoon* violations in the selection of the jury that convicted him.[123] The United States Court of Appeals for the Eleventh Circuit had applied the test from the *Witherspoon* footnote,[124] and found that the excluded juror's statements fell short of what would have been necessary to justify her exclusion.[125]

The Supreme Court reversed the appellate court and upheld Witt's sentence,[126] but based its decision on the standard articulated in *Adams* rather than *Witherspoon.*[127] The *Witt* Court characterized the famous *Witherspoon* footnote as dicta,[128] and stated its rationale for preferring the *Adams* test to *Witherspoon.*[129] The Court pointed out that under the sixth amendment,

"unmistakably clear" standard), *rev'd on other grounds,* 476 U.S. 28 (1986); Milton v. Procunier, 744 F.2d 1091, 1101-02 (5th Cir. 1984) (frankly discussing the Court's problems understanding *Adams*), *cert. denied,* 471 U.S. 1030 (1985); Keeten v. Garrison, 742 F.2d 129, 133 (4th Cir. 1984) (applying *Adams,* but in a fair cross-section context); Darden v. Wainwright, 725 F.2d 1526, 1528-30, 1532 (11th Cir.) (clearly embracing *Witherspoon's* "unmistakably clear" standard despite passing references to *Adams*), *cert. denied,* 467 U.S. 1230 (1984); King v. Strickland, 714 F.2d 1481, 1492 (11th Cir. 1983) (treating *Witherspoon* and *Adams* as the same; no "unmistakably clear" standard); O'Bryan v. Estelle, 691 F.2d 706, 711 (5th Cir. 1982) (accepting *Adams* but not applying it), *cert. denied,* 476 U.S. 1153 (1986); and Jurek v. Estelle, 623 F.2d 929, 942 (5th Cir. 1980) (accepting *Adams* and urging lower court to apply it on remand), *cert. denied,* 450 U.S. 1001 (1981).

122. 469 U.S. 412, 417-18 (1985).

123. *Id.* at 415. Witt was unsuccessful in securing postconviction review in the state courts. 387 So. 2d 922 (Fla.), *cert. denied,* 449 U.S. 1067 (1980). He then sought habeas corpus review in the federal courts. Witt argued that three of the jurors excluded for cause by the trial judge did not meet the *Witherspoon* standard for exclusion. 469 U.S. at 415 n.1.

124. 714 F.2d 1069, 1080-81 (11th Cir. 1983).

125. *Id.* at 1081. Although Witt was challenging the validity of the exclusion of three jurors, the court of appeals focused on the one juror whose answers on voir dire least clearly demonstrated an inability to follow the law. The Supreme Court agreed with that characterization, and therefore also focused on the questioning of that one juror. 469 U.S. at 415 n.1.

126. 469 U.S. at 418.

127. *Id.* at 423-24. The Court stated that it was "reaffirming" *Adams* and "clarifying" *Witherspoon. Id.* at 424.

128. *Id.* at 422. The Court supported this statement by attempting to distinguish *Adams* from *Witherspoon.* In *Witherspoon,* the Court was deciding only when prospective jurors could *not* be excluded. Therefore, reasoned the *Witt* Court, any statement discussing when they could be excluded was not part of the decision. *Id.* The Court also noted that Illinois law at the time of the *Witherspoon* decision gave juries in capital cases unlimited discretion in sentencing. *Id.* at 421. Therefore, the Court believed that the need for such a strong standard for exclusion of jurors did not exist where the jury's discretion was much more limited. *Id.* at 422.

129. *Id.* at 421-22.

challenges for cause were designed to eliminate jurors who could not be impartial.[130] The defendant was guaranteed no more in capital cases.[131]

The *Witt* Court apparently viewed the *Adams* test as preferable because it would eliminate those jurors whose views on capital punishment would prevent them from being impartial, but also viewed the *Witherspoon* test as going too far by slanting the jury in favor of the defendant.[132] The Court also noted with approval the *Adams* Court's rejection of the "unmistakably clear" standard of proof.[133] Although the second part of the *Witherspoon* test, the application of the "unmistakably clear" standard, appeared to be dead after *Wainwright v. Witt,* no clear rule on death-qualification had developed to take its place.

C. Lockhart v. McCree

The Supreme Court examined the death-qualification issue from yet another perspective in the case of *Lockhart v. McCree.*[134] The Court had previously established the requirement that jury venires must be drawn from a fair cross-section of the community,[135] and both state and the federal courts had considered fair cross-section challenges to the death-qualification of juries with varying results.[136] In *Lockhart,* the Supreme Court again considered a claim that death-qualification violated the fair cross-section requirement.[137] McCree had been convicted and sentenced to life imprisonment for felony murder by a jury from which those who stated that they could never vote for imposition of the death penalty had been excluded pursuant to *Witherspoon.*[138] McCree appealed his conviction on the grounds that the death-qualification process deprived him of an impartial jury because the exclusion of death penalty opponents produced a jury that did not represent a fair cross-section of the community.[139] The Supreme Court held first that the fair cross-section requirement did not apply to petit juries, but

130. *Id.* at 423.

131. *Id.*

132. *See id.*

133. *Id.* at 424-25.

134. 476 U.S. 162 (1986).

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

136. Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984), *cert. denied,* 476 U.S. 1153 (1986); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), *cert. denied,* 440 U.S. 976 (1979); Davis v. State, 236 Ga. 804, 225 S.E.2d 241 (1976), *rev'd,* 429 U.S. 122 (1976) (per curiam). *See, e.g., supra* notes 75-95 and accompanying text.

137. 476 U.S. at 167 (1986).

138. *Id.* at 166.

139. *Id.* at 167.

only to venires;[140] and second, that even if the fair cross-section requirement were extended to petit juries, the death-qualification of jurors would not violate it.[141] The Court's rationale for the second part of its decision was that a successful fair cross-section claim would require systematic exclusion of a distinct group in the community, such as blacks, women, or Mexican-Americans, and not a group defined only in terms of shared attitudes.[142] The *Lockhart* Court also rejected the claim that petitioner's sixth and fourteenth amendment rights to a trial by jury had been violated, holding that no affirmative mix of individual viewpoints had to be represented on a jury.[143]

Three justices dissented from the decision in *Lockhart.*[144] They argued that excluding jurors pursuant to the "unmistakably clear" language of *Witherspoon* gave the prosecution an advantage in cases with the most serious charges and the most severe penalties possible.[145] The dissent based its opinion on evidence, which it characterized as overwhelming, that death-qualified juries were more likely to convict, and to convict of more serious charges, than were those juries that were not death-qualified.[146] The dissent viewed the *Adams* decision as permitting the *Witherspoon* test to be used for the guilt phase of a bifurcated trial.[147] In addition, the dissenting opinion also referred to the factors identified in *Ballew v. Georgia*[148] as requiring reversal of the conviction, and stated that the same negative effects resulting from five-member juries were not only present, but magnified by the death-qualification process.[149] Apparently, at the time of the *Lockhart* decision, three justices opposed permitting the death-qualification of jurors on more than one ground.

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140. *Id.* at 173. The Court characterized an extension of the fair cross-section requirement to petit juries as unworkable and unsound. *Id.* at 174.

141. *Id.*

142. *Id.* at 175. The reason the Court included this discussion concerning the types of groups that could bring a fair cross-section claim is unclear. It certainly was not necessary in light of the case's main holding. Perhaps the Court was availing itself of the opportunity to discourage, through dicta in the *Lockhart* case, some anticipated claims from other groups that might best be defined as having "shared attitudes." *Id.* at 176.

143. *Id.* at 178.

144. *Id.* at 184 (Marshall, J., dissenting). Justices Brennan and Stevens joined in the dissent.

145. *Id.* at 184-85.

146. *Id.* at 184.

147. *Id.* at 197. The *Lockhart* dissent referred to the dissent in *Adams,* 448 U.S. at 52, where Justice Rehnquist had pointed out the lack of distinction between the jury's function in the guilt and sentencing phases of a capital trial. 476 U.S. at 197.

148. *Id.* at 198-202. For an enumeration of the detrimental factors identified in *Ballew,* see *supra* note 100 and accompanying text.

149. 476 U.S. at 199.

IV. JUDICIAL ERROR — HARMLESS OR REVERSIBLE?

After the series of death-qualification cases from *Witherspoon* through *Lockhart,* it appeared that the *Adams* and *Witt* standards had emerged as the basis for the death-qualification exclusion of jurors. This is true even though many subsequent cases still used the term "*Witherspoon* excludables."[150] The next two death-qualification cases the Supreme Court considered presented another conflict yet to be resolved. The cases of *Gray v. Mississippi*[151] and *Ross v. Oklahoma*[152] both involved judicial error in challenges for cause based on the prospective jurors' views on the death penalty. However, the similarity ends there. These two cases established completely different tests for reversible error.

A. Gray v. Mississippi

In *Davis v. Georgia,* the Supreme Court ruled that an improper *Witherspoon* exclusion required reversal of a death penalty sentence.[153] The issue presented in *Gray v. Mississippi* was whether *Davis* should be abandoned and an impermissible juror exclusion be given harmless error review.[154] In Gray's trial, the court refused to exclude at least five jurors for cause who stated that they could never impose the death penalty,[155] clearly a violation of *Witherspoon.* The prosecutor was forced to use peremptory challenges to eliminate all such jurors.[156]

When the next prospective juror, Mrs. Bounds, was called, she expressed reservations about the death penalty, but said that she could vote for it in certain cases.[157] The prosecutor wanted to use a peremptory challenge against Mrs. Bounds, but could not because he had no peremptory strikes remaining.[158] He asked the court to grant him another challenge, but that request was refused.[159] Instead, the trial court improperly excused Mrs. Bounds for cause.[160]

Gray was ultimately convicted of first degree murder and sentenced to

150. *See Lockhart,* 476 U.S. at 167 n.1 (majority opinion) (discussing the continued use of this technically inaccurate term).

151. 481 U.S. 648 (1987).

152. 108 S. Ct. 2273 (1988).

153. 429 U.S. at 123. For further discussion of *Davis v. Georgia,* see *supra* notes 77-89 and accompanying text.

154. 481 U.S. at 657.

155. *Id.* at 651-54.

156. *Id.* at 652.

157. *Id.* at 653.

158. *Id.* at 653-54.

159. *Id.* at 654-55.

160. *Id.* at 655, 661-62.

death.[161] The Supreme Court of Mississippi found a violation of state procedures, but reasoned that the trial judge had merely acted to correct his own error.[162] Consequently, the appellate court affirmed both the conviction and the death sentence.[163] Gray then appealed to the United States Supreme Court.

The Court discussed two analyses which might support the argument that the error in jury selection should be deemed harmless. The first approach, which appeared to the Supreme Court to have been accepted by the Mississippi court,[164] would view a state's retention of unexercised peremptory challenges at the close of jury selection as evidence that even if the trial court had not removed a venireperson for cause, the state would have done so by use of a peremptory challenge.[165] In this case, the state had no remaining peremptory challenges to use at the time of the voir dire examination of Mrs. Bounds.[166] The Mississippi court may have reasoned that the trial judge recognized his earlier error in failing to exclude some jurors and therefore restored a peremptory challenge to the prosecution.[167] Then, theoretically, though Mrs. Bounds was improperly excluded for cause, even if the judge had not removed her, the prosecutor would have used the restored peremptory challenge to strike her.[168] The second argument, which the State of Mississippi advanced to the United States Supreme Court, suggested that the error was an isolated incident without prejudicial effect, because even without Mrs. Bounds, the ultimate panel did fairly represent the community.[169]

The Supreme Court rejected both arguments and expressly declined to adopt a harmless error analysis in this type of case.[170] The Court very clearly stated that as to the "unexercised peremptory" argument, the critical question was not whether a juror was excluded due to the trial court's error.[171] Instead, the relevant inquiry was whether the trial court's error could have affected the composition of the jury panel as a whole.[172] Similarly, the argument that the exclusion was a technical error without prejudicial effect was rejected on the grounds that because the *Witherspoon/Witt*

161. *Id.* at 656.
162. *Id.* at 656-57.
163. *Id.* at 656.
164. *Id.* at 661.
165. *Id.* at 660-61.
166. *Id.* at 653.
167. *Id.* at 661.
168. *Id.*
169. *Id.*
170. *Id.* at 660-61.
171. *Id.* at 664-65.
172. *Id.* at 655 (quoting Moore v. Estelle, 670 F.2d 56, 58 (5th Cir.), *cert. denied,* 458 U.S. 1111 (1982)).

standard was rooted in a constitutional right to an impartial jury, a harmless error analysis could not apply.[173] The Court stated that some constitutional rights are so basic to a fair trial that when they are violated, the error can never be treated as harmless.[174] On that basis, the Court reversed the Mississippi judgment as to the imposition of the death penalty.[175]

Four justices dissented from the majority opinion.[176] The dissent did not attack the Court's reasoning on the harmless error issue, but argued that the trial court had properly excluded Mrs. Bounds but had merely articulated the wrong reason for doing so.[177]

B. Ross v. Oklahoma

The *Gray* decision appeared to establish a clear standard for reversal: whether the composition of the jury as a whole could have been affected by the trial court's error.[178] Only one year after deciding *Gray v. Mississippi,* however, the Supreme Court granted certiorari in another capital case involving judicial error concerning challenges for cause.[179]

The Supreme Court agreed to consider the case of *Ross v. Oklahoma* because it involved the defense's use of a peremptory challenge to correct the trial court's error.[180] Ross had been convicted and sentenced to death for the first degree murder of a police officer.[181] At Ross' trial, one prospective juror had indicated during voir dire questioning that in appropriate circumstances, he could recommend a life sentence.[182] However, after further questioning, he stated that if the defendant were convicted, he would automatically vote to impose the death penalty.[183] The defense sought to remove the juror for cause because he had indicated his own inability to follow the law during the penalty phase of the trial.[184] However, the trial judge refused to excuse the juror, and defense counsel was forced to use a peremptory strike to have him removed.[185]

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173. 481 U.S. at 668.

174. *Id.*

175. *Id.*

176. *Id.* at 672 (Scalia, J., dissenting). Chief Justice Rehnquist, and Justices White and O'Connor joined in the dissent.

177. *Id.* at 672-78.

178. *Id.* at 665 (majority opinion). For a more complete discussion of the *Gray* case and its holding, see *supra* notes 151-77 and accompanying text.

179. Ross v. Oklahoma, 482 U.S. 926 (1987).

180. 108 S. Ct. at 2273, 2276 (1988).

181. *Id.* at 2275-76.

182. *Id.* at 2276.

183. *Id.*

184. *Id.*

185. *Id.*

Ross appealed, claiming violations of both the sixth and fourteenth amendments.[186] The Oklahoma Court of Criminal Appeals affirmed both the conviction and the death sentence, stating that there was nothing in the record to show that any juror who sat was objectionable.[187]

Ross advanced both the fourteenth and sixth amendment claims to the Supreme Court on appeal, but the Court rejected both arguments.[188] In the majority opinion, Chief Justice Rehnquist set forth the basis for the Court's decision. First, he announced a standard completely different from that established in *Gray*. Where defense counsel used a peremptory challenge to remove a juror who should have been excused for cause, any claim of a violation of the sixth amendment right to a trial by an impartial jury would now have to focus on the jury that actually sat, and not on the juror who was excused.[189] Second, the Court found no sixth amendment violation arising out of the fact that the defendant was forced to use a peremptory challenge to correct the trial court's error, because peremptory challenges are not themselves guaranteed by the Constitution.[190] They are merely a statutory tool to assist in achieving the goal of an impartial jury.[191] Finally, the Court found no fourteenth amendment due process violation because Oklahoma state law required defendants to use their peremptory challenges in just such instances.[192]

Although the Court acknowledged that the trial judge's ruling was erroneous,[193] and that the failure to remove the juror in question and the defense's consequential need to exercise a peremptory challenge may have significantly changed the ultimate composition of the jury,[194] it did not apply the *Gray* test. Instead, the *Ross* Court interpreted *Gray* very narrowly, stating that it applied only in the context of an erroneous *Witherspoon* exclusion in a capital case.[195] Since *Ross* dealt with a failure to excuse rather than an improper exclusion, Chief Justice Rehnquist reasoned that the situation in *Gray* could be distinguished, and therefore the *Gray* standard should not be applied.[196] Furthermore, he characterized the language used in *Gray* as too

186. *Id.* at 2275.

187. *Id.* at 2276 (quoting Ross v. State, 717 P.2d 117, 120 (1986)).

188. 108 S. Ct. at 2277. The case was decided by a 5-4 vote. Justice Marshall wrote a dissent for the minority which included Justices Brennan, Blackmun and Stevens. *Id.* at 2280. For a discussion of the *Ross* dissent, see *infra* notes 198-203 and accompanying text.

189. 108 S. Ct. at 2277.

190. *Id.* at 2278 (citing Gray v. Mississippi).

191. 108 S. Ct. at 2278-79.

192. *Id.* at 2279.

193. *Id.* at 2275, 2277.

194. *Id.* at 2278.

195. *Id.*

196. *Id.* The Court focused on the fact that there was no need to speculate in *Ross* con-

broad to be applied literally.[197]

Justice Marshall wrote a dissent for the four member minority.[198] He began by pointing out that a man's life was at stake, and criticized the majority's action as game playing.[199] He argued that because it was undisputed that the trial court erred by not striking the juror in question for cause, the per se resentencing rule enunciated in *Gray* required Ross' death sentence to be vacated.[200] The dissent further asserted that even though Oklahoma case law required the defense to use a peremptory challenge in just such situations,[201] that law impermissibly burdened a defendant's sixth amendment right to a trial by an impartial jury by requiring the defendant to forfeit one of his peremptory challenges vis-a-vis the prosecution.[202] Accordingly, Justice Marshall argued that the Supreme Court should have invalidated Oklahoma's common law rule just as it had overturned statutory schemes in other cases where it found undue burdens on defendants' constitutional rights.[203]

The majority's complete departure in *Ross* from the test developed for a similar situation in *Gray* leaves an unanswered question as to the correct standard courts should apply in death-qualification cases.

C. Gray *or* Ross — *Can an Error in Jury Selection Ever Be Harmless?*

Quite clearly, the *Gray* and *Ross* decisions arose from very similar factual circumstances. Although the *Gray* decision involved a juror who was removed for cause, and *Ross* involved an erroneous failure to exclude, both *Gray* and *Ross* are cases in which the trial judge failed to apply properly the

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cerning whether the juror would have been removed by peremptory challenge, because he was in fact eliminated through the use of a challenge. However, the Court did not explain the genesis of its concern with certainty, nor its abandonment of the test it enunciated in *Gray*.

197. *Id.*

198. *Id.* at 2280 (Marshall, J., dissenting). Justices Brennan, Blackmun and Stevens joined in the dissent.

199. *Id.* at 2280.

200. *Id.*

201. The requirement comes from case law rather than statute. It provides that the failure to excuse a juror for cause cannot be the basis for appeal unless all peremptories were used and the defendant was left with an incompetent juror. *Id.* at 2279 (citing Stett v. State, 538 P.2d 1061, 1064-65 (Okla. Crim. App. 1978); Ferrell v. State, 475 P.2d 825, 828 (Okla. Crim. App. 1970)). The *Ross* majority quoted McDonald v. State, 54 Okla. Crim. 161, 164-65, as follows:

> [i]f counsel believes any juror was pledged to return a verdict imposing the death penalty, under the circumstances named, he should have purged the jury by challenge. He cannot speculate on the result of the jury's verdict by consenting that the juror sit on the panel, and, if the verdict is adverse, then assert he is disqualified.

108 S. Ct. at 2279.

202. 108 S. Ct. at 2282-83 (Marshall, J., dissenting).

203. *Id.* at 2283.

Witherspoon/Witt standard.[204] In *Gray,* the trial court removed a juror for cause even though she stated her ability to follow the law and apply the death penalty if appropiate, despite her own personal reservations about capital punishment.[205] The Court stated that the test for reversal in the case of such error was whether the composition of the jury as a whole could possibly have been affected by the error.[206] In *Ross,* conversely, the Court rejected the inquiry that it had identified in *Gray* and announced a new position. According to *Ross,* any challenge as to whether the impartial jury requirement was met must focus not on the error committed at trial (harmless or otherwise) but rather on the jury that was actually empaneled and that convicted the defendant.[207]

It is true that the Constitution guarantees all criminal defendants the right to a trial by an impartial jury.[208] Two devices which help to secure that right are the challenge for cause and the peremptory challenge.[209] There was no question in either *Gray* or *Ross* concerning whether the trial court erred in ruling on the challenges for cause.[210] In both cases, the error was admitted. The focus of the Supreme Court's inquiry was necessarily on the proper remedy — either automatic reversal or mere harmless error review.

The harmless error test the Court affirmed in *Chapman v. California*[211] described the standard necessary for reversal as whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.[212] The party who benefited from a constitutional error would have to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.[213] When compared with the two part test of *Chapman,* the *Gray* decision seems more defensible. A *Chapman*-type harmless error test would require the state to prove that the improper inclusion or exclusion of a juror did not contribute to the verdict.[214] The test in *Gray* requires reversal unless the state can prove that the trial court's error did not affect the jury composition as a whole.[215] That test, which considers whether the jury as a whole was affected, is much closer to

204. *See supra* notes 159-60, 184-85 and accompanying text.
205. *Gray,* 481 U.S. at 653.
206. *Id.* at 665 (quoting Moore v. Estelle, 670 F.2d 56, 58 (5th Cir.), *cert. denied,* 458 U.S. 1111 (1982)).
207. *Ross,* 108 S. Ct. at 2277.
208. U.S. CONST. amend. VI.
209. *See supra* notes 22-41 and accompanying text.
210. *Gray,* 481 U.S. at 651, 661; *Ross,* 108 S. Ct. at 2276.
211. 386 U.S. 18 (1967).
212. *Id.* at 23; *see also supra* note 85 and accompanying text.
213. 386 U.S. at 24.
214. *See supra* note 85 and accompanying text.
215. 481 U.S. at 665.

the *Chapman* rule than is ignoring the selection process and examining only the jury that was empaneled, as required by the rule enunciated in *Ross.*

The test the *Ross* majority established is actually only a harmless error test called by another name. It only permits consideration of the members of the jury ultimately empaneled. That inquiry does not go as far as the *Chapman* harmless error test that Justice Rehnquist advocated in his *Davis* dissent.[216] Perhaps the *Ross* majority thought it was returning to that earlier test. However, *Chapman* requires proof beyond a reasonable doubt that the error complained of did not contribute to the verdict.[217] It is impossible to predict which prospective juror might have been empaneled instead of a juror wrongly included, much less how he might have voted. Similarly, it is impossible to know how an improperly excluded juror might have voted had he remained on the panel. For these reasons, the *Chapman* test could never lead to a finding of harmless error in the context of jury selection because there are far too many variables to allow proof beyond a reasonable doubt that the verdict of a differently composed jury would have been the same.

Furthermore, *Ross* is not generally in agreement with decisions establishing the validity and importance of peremptory challenges. Although it is well established that peremptory challenges are neither authorized by nor protected under the Constitution,[218] they are nevertheless one of the most necessary elements of the trial by jury.[219] Where a certain number of strikes are provided to a defendant by statute, as they were in *Ross,* they cannot be taken away arbitrarily. If courts permitted such a practice, maintaining their availability would be pointless. As Justice Marshall pointed out in his dissent, that is exactly what happened in *Ross.*[220] While it is true that the statute in question provided Ross with nine peremptory challenges, and he was able to use all nine, he was nevertheless compelled to use one of them to cure an error of the trial court.

Presumably, under the *Ross* rationale, if the defendant was forced to use all nine of his peremptory strikes to cure a trial court's continuing errors, he would have no remedy. He would only be guaranteed the right to use a fixed number of challenges. He would no longer be guaranteed the right to use them at his discretion. A trial court could force a litigant to use one or more, perhaps even all, of his limited number of peremptory challenges to

216. 429 U.S. 122, 124 (1987).

217. 386 U.S. at 23-24.

218. Batson v. Kentucky, 476 U.S. 79, 91 (1986); Swain v. Alabama, 380 U.S. 202, 219 (1965); Stilson v. United States, 250 U.S. 583 (1919).

219. Pointer v. United States, 151 U.S. 396, 408 (1894); Lewis v. United States, 146 U.S. 370, 376 (1892).

220. *Ross,* 108 S. Ct. 2273, 2280 (Marshall, J., dissenting).

secure a right provided to him both by statute and under the common law. The implication of the rule created in *Ross* is that the peremptory challenge would be effectively eliminated. The *Gray* decision is preferable to *Ross* because it avoids a result that would conflict with the Supreme Court's demonstrated commitment to retaining the peremptory challenge.[221]

The majority in *Ross* did not convincingly distinguish the case from *Gray*, nor did it advance a persuasive rationale for completely departing from its prior rule. The real reason for the shift in standards between the *Gray* and *Ross* decisions appears to be the shift in the composition of the Court. Justice Powell agreed with the plurality that decided *Gray* on all issues except one.[222] By the time *Ross* was decided, Justice Kennedy had replaced Justice Powell on the bench, and joined the four dissenters from *Gray*.[223] Similarly, the plurality from *Gray* became the dissenters in *Ross*.[224] It is this change in the composition of the Court, rather than a change in legal reasoning, that best explains the Court's sudden shift of position.

V. CONCLUSION

The Constitution provides criminal defendants the right to trial by an impartial jury and a guarantee of due process under the law. In seeking to protect these rights, the Supreme Court has identified, albeit inconsistently, several activities that are not permitted. The goal of *Witherspoon* and its progeny was to secure impartial juries for defendants in capital cases. The early death-qualification cases examined the process by which jurors could be excluded. Similarly, the decision in *Gray* required an examination of the process employed in a criminal trial in order to decide whether constitutional violations occurred. In *Ross*, the Court conversely held that the process does not matter as long as the desired result is achieved.

For these reasons, the Supreme Court should review its decisions in death-qualification cases and reconsider its reasons for limiting the practice of death-qualification. The Court should recognize that the *Gray* decision is more consistent with the protection it has traditionally afforded to the constitutional rights of defendants in capital cases. The Court should not overlook the reason that the two types of challenges were initially created, and should not leave defendants in a position that requires them to surrender

221. *See supra* notes 28-41 and accompanying text.

222. He disagreed with the plurality's criticism of the prosecutor's use of peremptory challenges to excuse jurors who expressed hesitation about the death penalty. 481 U.S. at 670 (Powell, J., concurring).

223. 108 S. Ct. at 2275.

224. *Id.* at 2280 (Marshall, J., dissenting).

their statutory rights to ensure receipt of the protections guaranteed to them under the Constitution.

Karen T. Grisez