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Who’s Qualified to Decide Who Dies?

Wainwright v. Witt, 105 S. Ct. 844 (1985)

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I. INTRODUCTION

The imposition and use of the death penalty have become disturbingly attractive to America today. In an understandable effort to deal with incomprehensible violence and senseless homicides, Americans have accepted almost enthusiastically an abominable means to achieve an end. Nearly seventy percent of the population support the death penalty.1 As of August 1, 1985, 1540 inmates were awaiting execution

The number of inmates actually executed has risen drastically in the last few years. Two persons were put to death in 1982, five in 1983, twenty-one in 1984, and as of July 9, 1985, fifteen persons had been executed.3

The death penalty is the ultimate punishment handed down by our criminal justice system. The final result of the death penalty is unalterable. Because the death penalty is unique, "different in kind" from all other punishment,4 the federal and state judiciaries have, over time, constructed various procedural safeguards that apply only to defendants in capital cases.5

Some would suggest, however, that these procedural safeguards are not adequate to overcome a major disadvantage that faces a defendant in a capital case.6 During the jury selection process, before the trial even begins, prosecutors are allowed to "death-qualify" members of the venire from which jurors are chosen. "Death-qualification" generally refers to a process used by prosecutors in capital cases to exclude venire members who are opposed to capital punishment. The standard applied to decide which venire members will be stricken for cause due to their views on capital punishment is the subject of this Article.

The landmark case of Witherspoon v. Illinois,7 established the standard that modern day courts have used to scrutinize the death-qualification procedure. Death-qualification existed prior to Witherspoon and "was originally a by-product of the mandatory system of capital punishment formerly in effect in the United States."8 Witherspoon was the first time the United States Supreme Court squarely addressed the issue of the effect of "death-qualified" juries on the constitutional rights of capital defendants. It is important to note that Witherspoon decided only the question of how death-qualification affected a jury's sentencing determination. The Court explicitly left open the question of whether death-qualified juries were conviction prone.9

Recently the Court reexamined the Witherspoon standard in light of what the Court saw as confusion surrounding the application of the

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3. Id. at 3.
6. Id. at 97.
8. See W. White, supra note 5, at 97 (citation omitted).
Witherspoon test in the lower courts. In Wainwright v. Witt, the Court dramatically altered the Witherspoon test. The Court's ruling effectively broadened the class of persons who may be excluded for cause due to their personal hesitation to impose the death penalty. At the same time, the Witt decision has lowered to an unacceptable level the standard of proof required to show negative death penalty bias.

This Article examines the Witt decision and demonstrates why the holding is at odds not only with death-qualification precedent but also with nearly all the other death penalty decisions of the Court in the past two decades. Following a presentation of the Witt decision in Part II, Part III examines the Court's pre-Witt decisions to illustrate the course of the death-qualification decisions since the landmark Witherspoon holding, especially those cases relied upon by the Witt majority to support the Court's change of heart on this issue. Part IV of this Article scrutinizes the Witt decision in light of these cases and demonstrates the incongruity and disquieting deviation from precedent exemplified by the Court's holding in Witt. This analysis will show that the Court has disregarded not only death-qualification precedent but, at the same time, has suddenly exhibited a disconcerting insensitivity to adequate constitutional protection for capital defendants. This insensitivity is clearly out of step with the Court's traditional attitude toward death penalty issues in general. Part V of this Article discusses briefly the ramifications of the Witt decision on the issue of death-qualification and Witt’s potential impact on the death penalty in a broader sense. The Witt decision may have laid the groundwork for an upcoming death-qualification case before the Court this Term, and is probably an unfortunate sign of the current Court's callousness toward defendants sentenced to death.

II. WAINWRIGHT V. WITT

A. Facts

Johnny Paul Witt was convicted of first-degree murder in the State of Florida and sentenced to death. The evidence shown at trial established that Witt and a friend committed the murder of an eleven-year-old boy while they were bow and arrow hunting. The two had apparently spoken several times about killing a human and had been known to "stalk" humans as they would an animal. On the day of the murder the pair was hunting in a wooded area near a trail often used by children. As the eleven-year-old victim rode by on his bicycle, Witt's accomplice hit the boy in the side of the head with a star drill bit. The two gagged the stunned victim, placed him in their car's trunk, and

11. See infra note 78 and accompanying text.
12. See infra note 156 and accompanying text.
drove to a deserted grove. When they removed the boy from the trunk, they discovered that he had suffocated from the gag. The pair then proceeded to commit various sexual and other violent acts on the body, dug a grave, and buried the body.13

Witt was tried by a jury and convicted of first-degree murder. The trial judge sentenced him to death upon the jury’s recommendation. Witt appealed to the Florida Supreme Court claiming that several prospective jurors had been improperly excluded for cause through the death-qualification procedure, in violation of the decision in Witherspoon. The Florida Supreme Court affirmed the conviction and sentence.14 After an unsuccessful attempt at post-conviction review in the state courts, Witt filed a petition for a writ of habeas corpus in federal district court pursuant to section 2254 of the Habeas Corpus Act. The federal district court denied the petition,15 but the Court of Appeals for the Eleventh Circuit reversed and granted the writ. The court of appeals ruled that under the Witherspoon standard, one of the prospective jurors had been improperly excluded for cause after questioning by the prosecutor during voir dire.16 The United States Supreme Court granted certiorari to reexamine the procedures for selection of jurors in capital cases and to consider standards for federal courts reviewing those procedures upon petition for a writ of habeas corpus.

B. Majority Opinion

Justice Rehnquist’s majority opinion expressed concern that trial courts had been given the very difficult task, considering the state of the law at the time of Witt, of distinguishing between jurors whose opposition to capital punishment would not allow them to be impartial or properly apply the law and those who, despite these feelings, could be responsible, law-abiding jurors.17

The majority expressed displeasure not only with the lower courts’ application of the Witherspoon standard over the years, but with its application in previous decisions of the Court.18 These decisions had adhered to the Witherspoon requirement that a juror must make it “unmistakably clear” that he or she “would ‘automatically’ vote against the death penalty” before that juror could be excluded for cause.19 Justice Rehnquist went on to cite two recent decisions of the Court which demonstrated no ritualistic adherence to the above-

16. 714 F.2d 1069 (11th Cir. 1983), modified, 723 F.2d 769 (11th Cir. 1984).
18. Id. at 849.
19. Id. (emphasis added).
1. The Adams Test

The Witt majority held that the test for determining juror exclusion articulated in Adams was preferable to the Witherspoon standard. The Adams standard states that if a person's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," that person may be excluded from sitting on a jury. The Court cited several reasons supporting its preference for the Adams test. First, the Witherspoon decision involved an Illinois statutory scheme that gave the jury in a capital case unlimited discretion in imposing the death penalty. The majority pointed out that sentencing juries no longer have such discretion due to the Court's decisions in Furman v. Georgia and Gregg v. Georgia, and that many states, such as Texas, have adopted a "guided discretion" sentencing scheme whereby jurors do not set the death penalty; jurors merely answer questions of fact put to them by the trial judge and, depending on the answers, the judge sets the penalty. Therefore, the majority concludes, it no longer makes sense to exclude only those jurors who will "automatically" vote against a death penalty because they are not making the death-penalty decision.

Second, Justice Rehnquist pointed out that the Witherspoon standard was drawn from dicta in a footnote of that case. The Court has in the past found footnote language embodying dicta "not controlling." Finally, the majority contended that Witherspoon's holding merely limited a state's power to exclude jurors as another step toward the goal of impanelling an impartial jury. Furthermore, the court concluded, there is nothing unique about jury exclusion under Witherspoon as compared to any "traditional reasons for excluding jurors." Thus a capital defendant is not entitled to any special legal presumption or standard such as the strict standard set forth in Witherspoon.

The Court, for the above reasons, held that the simplified standard in Adams is the proper standard for determining whether a juror with scruples against the death penalty should be excluded for cause. In addition, the majority dispensed with Witherspoon's requirement that a juror's bias to "automatically" vote against the death penalty be

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22. Id. at 45.
shown with “unmistakable clarity.”

2. Standards for Federal Courts Reviewing Death-Qualification Procedures Under Section 2254 of the Habeas Corpus Act

The second issue before the Court in Witt was the standard to be applied when, under a writ of habeas corpus, a federal court reviews a trial court’s rulings on exclusion of jurors under death-qualification procedures.

Review of the Witt case arose after the defendant petitioned for habeas corpus relief under section 2254 of the Habeas Corpus Act. Under section 2254(d) a federal court reviewing the case must accord findings of state courts a “presumption of correctness” on all “factual issues.”

The Eleventh Circuit in Witt did not rule on whether the trial court’s finding was subject to a “presumption of correctness” because it held that the case required reversal on other grounds. However, the Eleventh Circuit held in a later case, Darden v. Wainwright, that Witherspoon inquiries were a “mixed question of law and fact” and thus not subject to section 2254(d).

Justice Rehnquist’s opinion noted that in Patton v. Yount, the Court held that a trial judge’s finding that three venire members were not biased, and thus qualified to serve as jurors, was a “finding of fact subject to section 2254(d).” The majority further stated that the Eleventh Circuit’s decision in Darden was based on “the misapprehension that the standard for determining exclusion was . . . Witherspoon’s footnote 21—which imposed ‘a strict legal standard’ and ‘a very high standard of proof.’ ” The majority reemphasized its position that excluding capital sentencing jurors “is no different from excluding jurors for innumerable other reasons which result in bias.” Applying this reasoning and noting the Eleventh Circuit’s error in Darden, the majority then held that Patton must control. Therefore, the Court decided that the question of proper exclusion of prospective jurors in capital cases is a factual issue subject to section 2254(d). Consequently, federal review courts must apply a “presump-
tion of correctness” when scrutinizing a trial judge’s death-qualification rulings.

C. Dissent

It is no surprise that Justices Brennan and Marshall dissented from the Witt decision. Brennan and Marshall have consistently argued that the imposition of a death sentence under any circumstances contravenes the eighth amendment’s prohibition against cruel and unusual punishment.

The dissenters stated that they would affirm the court of appeals’ decision in Witt regardless of their view of the death penalty. In general, the dissent maintained that the majority completely missed the point of the Witherspoon decision. Justice Brennan asserted that the Witherspoon decision and subsequent holdings following the Witherspoon standard stood for the proposition that a death-qualification procedure not meeting the strict standards of Witherspoon denies a defendant “a neutral jury drawn from a fair cross-section of the community” and produces a jury from which an “identifiable segment of the community has been excluded.” The resulting jury is “uncommonly willing to condemn a man to die.” In essence, the dissent contended that the majority opinion completely ignored the constitutional safeguards set up in Witherspoon to protect defendants facing the possibility of a death sentence.

Central to the dissent’s criticism of the majority opinion is the assertion that the Court had “brazenly” revised the Adams decision to suit its purposes of deserting the Witherspoon standard. The dissent noted that Justice Rehnquist was, ironically, the sole dissenter in Adams. Rehnquist’s Adams dissent argued that Adams “expanded the scope of Witherspoon’s restrictions.” The Witt dissent, as well as virtually all state and federal courts construing Adams, had interpreted Adams as consistent with Witherspoon. The dissent also noted that Adams quoted Witherspoon’s footnote twenty-one with approval.

III. “DEATH-QUALIFICATION” PRIOR TO WITT-WITHERSPOON AND ITS AFTERMATH

Jury selection is an important part of any criminal trial. Nowhere is it more significant, however, than in a capital case where the de-

39. Id. at 860 (Brennan, J., dissenting).
40. Id. at 860-61.
41. Id. at 860.
42. Id. at 866.
43. Id.
44. Id.
DEATH-QUALIFIED JURIES

fendant's life is at stake. Through the screening of jurors during voir
dire, both prosecutors and defense attorneys attempt to “stack the
deck” with jurors they feel will be more sympathetic to their cause.
Impartiality in a jury is the system's goal but a totally neutral jury is
virtually impossible. The prosecution and defense should be assured,
however, that jurors will at least consider the point of view advocated
by counsel at trial.

This reality of jury selection is what makes death-qualification in a
capital trial such a powerful tool in the prosecutor's hands. Prosecu-
tors can eliminate those persons who will not consider, or are less
likely to consider, returning a verdict of guilty or imposing a death
sentence due to personal scruples against capital punishment.

In Witherspoon the United States Supreme Court struck down as
unconstitutional an Illinois death statute that permitted the exclusion
for cause of any venireperson who has “conscientious scruples against
capital punishment, or . . . is opposed to the same.” The Court
stated that “[i]n its quest for a jury capable of imposing the death pen-
alty, the State produced a jury uncommonly willing to condemn a man
to die.” After holding that the Illinois selection process produced a
jury unfairly biased in favor of the death penalty, the Court articu-
lated a more equitable standard of death-qualification. That standard
attempted to strike a balance between the state's legitimate interest in
carrying out a constitutionally valid death penalty statute and the de-
fendant's sixth amendment right to a fair trial and impartial jury. The
standard set forth allowed the state to execute a defendant sentenced
to death by a jury as long as the only venirepersons who had been
stricken 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) their atti-

tude toward the death penalty would prevent them from making an impartial
decision as to the defendant's guilt.

For the next seventeen years, this language from the often-quoted
footnote twenty-one, along with footnote nine of Witherspoon, was
used by lower courts, as well as the United States Supreme Court, as
the guiding standard for “death-qualification.”

46. Id. at 520-21.
47. Id. at 522-23 & n.21 (emphasis in original).
48. Id. at 518 n.9. Footnote 9 relevant language states: “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.” Id. at 518 n.9.
(1970); Boulden v. Holman, 394 U.S. 478 (1969); Hackathorn v. Decker, 438 F.2d
1363 (5th Cir. 1971); People v. Washington, 71 Cal. 2d 1061, 458 P.2d 473, 80 Cal.
Rptr. 567 (1969).
The Court in *Witherspoon* overturned the petitioner's death sentence, not his conviction. The petitioner had argued that Illinois' death-qualification procedure produced a jury biased in favor of conviction as well as the imposition of the death penalty. The Court held that "the data adduced by petitioner, . . . are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." *Witherspoon* and its progeny have been cases that ruled on the composition of death-qualified juries and their sentencing determinations, not on their guilt/innocence decisions.

*Witherspoon* was emphatically reaffirmed by the Court in *Boulden v. Holman,* and *Maxwell v. Bishop.* In *Boulden* the Court made it clear that even though a person does not "believe in" capital punishment or has a "fixed opinion against" it, that person "might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case."

In *Maxwell* the Court reemphasized its position by holding that a death sentence could not be carried out if it was imposed or recommended by a jury from which venirepersons were excluded simply because they had expressed general objections to the death penalty. The opinion once again asserted that unless a venireperson made it unmistakably clear that he or she would automatically vote against the imposition of the death penalty, the lower court could not assume that this person would not at least consider capital punishment if the facts of the case warranted such a finding.

In a more recent opinion from the Court, *Adams v. Texas,* the *Witherspoon* standard was once again applied to hold that a Texas statutory oath taken by jurors contravened the sixth and fourteenth amendments as construed in *Witherspoon.* Through the oath, jurors pledged that the mandatory penalty of death or imprisonment for life would not "affect [their] deliberations on any issue of fact." The *Adams* majority opinion, in a brazenly revised form, along with Justice Rehnquist's sole dissenting opinion in *Adams,* are eventually merged to become the majority opinion in *Wainwright v. Witt.* It is worthwhile, therefore, to devote special attention to the Court's opinion and holding in *Adams.*

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51. *Id.* at 516-17.
52. *Id.* at 517-18.
57. *Id.* at 40.
The Court granted certiorari in the *Adams* case to answer two questions. First, whether the *Witherspoon* doctrine was applicable to the bifurcated procedure Texas employed in capital cases. Second, if *Witherspoon* was applicable to such proceedings, whether in the case at bar the exclusion of jurors pursuant to Texas Penal Code section 12.31(b) violated the *Witherspoon* doctrine.\textsuperscript{58}

As to the first question, the Court held that *Witherspoon* did apply to the bifurcated capital case proceedings used in Texas. The issue arose because the *Witherspoon* case dealt with an Illinois statute that gave the jury total discretion as to whether the death penalty was proper in any given case. Texas, on the other hand, conducted capital trials in a two-part proceeding. First, the jury decided the issue of guilt. Second, the same jury responded to three questions of fact from the judge relating to the defendant and the acts committed by the defendant.\textsuperscript{59} If the jury found beyond a reasonable doubt that the answers to these questions were “yes,” then the judge was required to impose the death sentence. Even if only one of these questions was answered negatively, the judge must impose, by statute, a sentence of life imprisonment.\textsuperscript{60} The Court conceded that the Texas jury played a much more limited role in imposing the death sentence than did the *Witherspoon* Illinois jury. However, even the State of Texas conceded that a "guided discretion jury" will know, and are so informed, that affirmative answers to the statutory questions will result in an automatic imposition of the death sentence.\textsuperscript{61} A Texas juror's views on the death penalty are thus equally as relevant whether the jury has total or guided discretion in imposing the death sentence.

The Court went on to hold that Texas' use of section 12.31(b) in *Adams* violated the *Witherspoon* standard because jurors were excluded "on a broader basis" than that allowed in *Witherspoon*.\textsuperscript{62} The statute provided that a juror must be excluded unless she or he states under oath that the mandatory death or life imprisonment sentence will "not affect his or her deliberations on any issue of fact."\textsuperscript{63} Those jurors in the *Adams* case that were unwilling or unable to take such an oath were excluded by the trial judge. Texas disqualified not only those persons who could be validly excluded under the *Witherspoon*

\begin{itemize}
  \item \textsuperscript{58} See infra note 63 for text of statute.
  \item \textsuperscript{59} *Adams v. Texas*, 448 U.S. 38, 41 (1980).
  \item \textsuperscript{60} Id.
  \item \textsuperscript{61} Id. at 47 n.4.
  \item \textsuperscript{62} Id. at 48.
  \item \textsuperscript{63} Tex. Penal Code Ann. § 12.31(B) (Vernon 1974) provides as follows:
    
    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.
\end{itemize}
doctrine, those unable to even consider the penalty of death or whose views would not allow them to bring in a verdict of guilty, but also those persons who honestly admitted the possibility that a death penalty might affect how they looked at the evidence in relation to proof beyond a reasonable doubt. The majority opinion stated:

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.64

As the court pointed out, uneasiness, emotional involvement or the inability to know for sure whether such a serious penalty will affect one’s view of the facts is not equivalent to a juror being unwilling or unable to follow the court’s instructions and obey his oath.65 Assessments and honest judgments as to facts and what a juror believes to be a reasonable doubt are inherent in the jury system. One would hope that the thought of a defendant being put to death by the state would in some way “affect” a juror’s deliberations.

Adams held that jurors may be excluded if that person’s beliefs about capital punishment “would lead them to ignore the law or violate their oaths.”66 But the Court reversed the defendant’s death sentence in that case because Texas excluded jurors under section 12.31(b) “whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected” by the thought of a person being put to death.67

Of particular interest to this Article is Justice Rehnquist’s sole dissenting opinion in Adams.68 Justice Rehnquist was of the opinion that the majority had expanded the Witherspoon doctrine in Adams. The dissent noted that a reexamination of the Witherspoon doctrine was warranted by post-Witherspoon capital punishment decisions of the Court. Justice Rehnquist contended that today’s juries are no longer vested with the total discretion that juries had at the time of Witherspoon. Specifically, the Texas statute at issue in Adams required a judge to impose the death penalty if the jury answered these three questions affirmatively:

1. whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
2. whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
3. if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the

65. Id. at 50.
66. Id.
67. Id. at 50-51.
68. Id. at 52 (Rehnquist, J., dissenting).
The dissent argued that "[i]t is hard to imagine a system of capital sentencing that leaves less discretion in the hands of the jury..." This difference in the role of the jury in *Witherspoon* and the Texas jury in *Adams* requires a vastly different analysis according to the dissent. Excluding jurors who cannot take the oath required of Texas jurors should be constitutional, the dissent maintained, because their role requires them to swear that they will answer the trial judge's questions only on the basis of the evidence shown without regard to the consequences of their answers.

Justice Rehnquist's dissenting opinion in *Adams* takes on special significance in light of his majority opinion in *Wainwright v. Witt*. The next section of this Article examines the disturbing irony of how the *Adams* dissent was guilefully merged with the *Adams* majority opinion (in an abbreviated form) to become the basis for *Witt* and the end of the *Witherspoon* doctrine.

IV. ANALYSIS

A. The *Witt* Majority's Interpretation of the *Adams* Test

There is no doubt that the Court in *Witt* struggled with a perplexing area of criminal law. Adjudicating substantive and procedural issues surrounding the death penalty is an exacting task which results in the onerous responsibility of deciding who lives and who dies. At the same time, if a society ordains that human life is so precious that the taking of a life merits the killer's own death, at the very least it is incumbent upon that society to demand unyielding safeguards for defendants and rigorous scrutiny of governmental decisions to execute fellow human beings. Anything less is pure hypocrisy.

The United States Supreme Court has been intensely sensitive to any issue bearing upon the punishment of death. Justice Stevens made this posture clear when he stated "because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards." In *Witherspoon*, the Court dove head-long into the death penalty quagmire. Prior to *Witherspoon* the state's imposition of the death penalty was largely unchecked by the Supreme Court. *Witherspoon* was the first case in which the Court struck down a state procedure that was an integral part of the state's death penalty administration. The *Witherspoon* decision marked the beginning of

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69. *Id.* at 53.
70. *Id.* at 54.
the Court’s efforts to establish “unique safeguards” for capital defendants.

This tradition continued with the Court’s decisions in Furman v. Georgia,\(^\text{73}\) in 1972 and Gregg v. Georgia,\(^\text{74}\) in 1976. The Furman decision rocked the nation when it overturned more than 600 death sentences by invalidating four states’ statutory death penalty schemes. These states’ statutes allowed a jury absolute discretion in imposing either the death sentence or life imprisonment following conviction of a capital offense. The Gregg decision refined Furman and settled the four-year-long controversy over the constitutional legitimacy of capital punishment itself. Gregg held that the death penalty was not, in and of itself, unconstitutional as “cruel and unusual punishment” prohibited by the eighth amendment.\(^\text{75}\) Further, the Court held that a jury-discretionary system was not invalid under Furman as long as it was a scheme of “guided-discretion” set up by a state’s legislature.\(^\text{76}\) The Court in Furman and in Gregg expressed great concern over the possibility of arbitrary and capricious imposition of a death sentence. The Court’s vigilance in establishing a just and rational system of capital punishment was continually illustrated in its post-Gregg decisions, which resulted in still more procedural safeguards for capital defendants.\(^\text{77}\)

The Court’s post-Gregg decisions have shown a traditional commitment to a stringent standard of due process, “super due process,”\(^\text{78}\) in any case involving the death penalty. Some commentators have suggested that the Court’s death penalty decisions in 1983-84 illustrated an abandonment of these due process requirements.\(^\text{79}\) The Court’s decision in Wainwright v. Witt supports this suggestion and leaves little doubt that the Court is slowly but surely dismantling the scrupulous safeguards which have traditionally protected capital defendants.

Under the guise of a paternalistic search for clarity, the majority in

\(^{73}\) 408 U.S. 238 (1972).

\(^{74}\) 428 U.S. 153 (1976).

\(^{75}\) The Gregg decision upheld the Georgia death penalty statute, GA. CODE ANN. § 27-2534.1(b) (Supp. 1982), which is the model for most current death penalty statutes in other states.


\(^{79}\) See, e.g., id.
Witt essentially rewrote the Adams opinion in an effort to simplify the death-qualification standard for trial courts. Justice Rehnquist, writing for the majority, contended that the Witherspoon death-qualification standard was outdated, in any event was only dicta, and was far too difficult for trial courts to apply. The majority then proceeded to emasculate the Witherspoon standard and held that the Court's more recent decision in Adams was the proper standard. The dissent in Witt aptly notes: "Adams did not . . . desert the principles of Witherspoon. It is the Court's brazenly revisionist reading of Adams today that leaves Witherspoon behind."80

Although the Witt majority stated that a new "Adams test" merely simplified the Witherspoon standard, in reality the two tests differ vastly in language and substance.81 The Adams test states that a juror may be excluded for cause if his views regarding the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."82 The Adams test no longer requires, according to the Court's holding, that a juror would "automatically" vote against the death penalty to be excluded nor that that bias be proved with "unmistakable clarity."83

Justice Rehnquist's majority opinion offered three justifications for preferring what the opinion termed the "Adams test." The first reason is tied to changes in the role of sentencing juries in capital cases since the Witherspoon decision. The Court's second justification stems from the contention that Witherspoon's footnote twenty-one was merely dicta with no precedential weight. The final, and possibly most disturbing justification is the majority's view that the Adams test for exclusion of jurors is in accord with traditional reasons for excluding jurors for any other bias, in any other kind of case, capital or non-capital.

The majority's main justification for preferring the new "Adams test"—the changes in the role of sentencing juries since Witherspoon—is analytically troublesome for several reasons. Justice Rehnquist stated in Witt that "[i]n Witherspoon the jury was vested with unlimited discretion in choice of sentence." However, "[a]fter our decisions in Furman v. Georgia and Gregg v. Georgia sentencing juries [can] no longer be invested with such discretion."84 At least one commentator has suggested that this assertion by the Court is inaccurate.85 "Capital sentencing discretion, the Court has said, may remain

81. See supra note 47 and accompanying text.
83. Id.
84. Id. at 851 (citations omitted).
The article points out that Texas, where Adams hailed from, is the only state where juries do lack such discretion. The majority in Witt has now promulgated a new death-qualification standard for all states which authorizes a death penalty based on a unique sentencing scheme from Texas. “[J]ustice Rehnquist ignored the jury’s role in Florida, the State that had condemned Witt to death, and sought his proof elsewhere.”

The Witt majority, on the other hand, contends that today’s capital sentencing juries play sufficiently different roles to warrant the new “Adams test.” In essence, the majority opinion tells us that today’s sentencing juries do not have the same degree of power over the defendant’s life, and since the guided discretion system, as that suggested in Gregg v. Georgia, adequately protects the defendant, the states no longer must seat jurors who, though otherwise qualified, might be hesitant to impose the death penalty. The only concern the state has today is seating jurors who will follow their oaths and the judge’s instructions and not let a minor detail like an execution cloud their minds. The logic of the majority’s opinion at this point is untenable. As the dissent in Witt points out, Justice Rehnquist used this same argument to dissent from the Adams opinion. Now he uses the argument to justify “a ‘test’ purportedly derived from the Court’s holding in [Adams].”

Precedent and logic point to a result contrary to that reached by Justice Rehnquist in Witt. Capital sentencing juries are well aware of the consequences of their decisions, whether it be a total discretion system, guided discretion system, or the unique factfinding role of the Texas jury. Justice Rehnquist’s attitude of “don’t blame it on the jury if the defendant gets the death sentence” is exactly the type of argument that the Court ruled unconstitutional in a case decided five decades ago.

86. Id. at 1075, 1051 n.99, referring to California v. Ramos, 463 U.S. 992 (1983), in which Justice O’Connor stated:

[The constitutional prohibition on arbitrary and capricious capital sentencing determinations is not violated by a capital sentencing “scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute.”]


87. Gillers, supra note 85, at 1075.

88. Id. at 1076. See also Winick, Witherspoon in Florida: Reflections on the Challenge for Cause of Jurors in Capital Cases in a State in Which the Judge Makes the Sentencing Decision, 37 U. MIAMI L. REV. 825 (1983), for a complete discussion of Florida juries advisory role in sentencing. The author further suggests that there should be no death-qualification of capital juries in states where judges do the sentencing.

89. See supra note 75.

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months after Witt. In Caldwell v. Mississippi,91 the Court vacated the death sentence of the petitioner due to the prosecutor’s closing remarks to a sentencing jury urging them not to view themselves as finally determining whether the defendant would die, because the Mississippi Supreme Court would review their sentence for correctness. The prosecutor was allowed by the trial judge to make it clear to the jury that they were merely following the law laid down by the Mississippi legislature, not arbitrarily imposing a death sentence.92

The Court in Caldwell held that a death sentence, imposed by a jury who was led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere, could not stand.93 It was held that such a death sentence violated the eighth amendment’s “‘need for reliability in determinations that death is the appropriate punishment in a specific case.’”94

The majority argument in Witt cuts directly against the grain of Caldwell as well as the Court’s other eighth amendment decisions in capital cases which require that capital sentencing juries treat their power to determine the appropriateness of death as an “‘awesome responsibility.’”95 Because the eighth amendment demands such “reliability” and requires jurors to recognize their “awesome responsibility” when handing down a sentence of death, it is incumbent upon states to seat jurors who will meticulously scrutinize all the evidence before them. Empirical evidence accumulated since Witherspoon has shown that death-qualified juries are less likely to produce such results.96 Death-qualified juries tend to be homogeneous in attitude and life experience, tend to produce less discussion and debate in deliberation and require less evidence to find proof beyond a reasonable doubt.97

Given this evidence and the new Adams test which allows even broader exclusion on the basis of death penalty attitudes, the Witt decision has produced a situation in which capital defendants are almost assured of a sentencing jury that will be biased in favor of imposing the death sentence.

Justice Rehnquist, in an effort to assure that states are not re-

92. Id. at 2638.
93. Id. at 2637-38.
94. Id. at 2636-37 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (emphasis added)).
97. See authorities cited supra note 96.
quired to seat jurors biased in favor of capital defendants, has swung the pendulum to the opposite extreme. The majority eliminated the requirement that a juror make it "unmistakably clear" that he or she would never vote for the death penalty. The *Witt* ruling allows states to exclude jurors who are merely unsure or admit some hesitation about the death penalty or its effects on their deliberations. The majority is now asking the impossible of a juror. How could a juror make such a determination *before* hearing one shred of evidence or fact against the accused? In fact, the *Witt* case is a perfect example of this dilemma. Even the most adamant opponent of the death penalty would cringe after hearing the gruesome details of the murder and molestation of an eleven-year-old boy. It is likely that any hesitations about imposing the death sentence on the defendant in *Witt* might quickly disappear if a juror were convinced beyond a reasonable doubt that Witt had committed the acts described in the facts.

In addition, as the dissent in *Witt* points out, if a juror expresses uncertainty as to whether her death penalty attitude will color her judgment as to facts in a case, it should be up to the state to prove that such bias will rise to a level of not allowing a juror to follow her oath or follow a trial judge's instructions. A trial judge should not be allowed to assume that a potential juror who has qualms about the death penalty is automatically an untrustworthy person who cannot be depended on to follow the law. Just as the "proof beyond a reasonable doubt standard of guilt allocates to the State any cost of uncertainty" as to a defendant's guilt, so should the cost of uncertainty as to a prospective juror's bias be allocated to the State.

The *Witt* majority's second justification for preferring the *Adams* test was that the *Witherspoon* standard was developed from dicta in a footnote. It is perplexing, if indeed the standard in the footnote was merely useless dicta, that the Court itself and a score of federal and state courts had adopted the standard over some seventeen years. Indeed, even the *Adams* opinion, on which Justice Rehnquist bases his disapproval of the *Witherspoon* standard, quotes *Witherspoon*'s footnote twenty-one with approval. The Court's second justification thus appears to be only a weak excuse to relieve the Court of the burden of explaining away the seventeen years of precedent upholding the *Witherspoon* standard.

The Court's third justification for its opinion is based on an alarm-

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98. See supra note 13 and accompanying text.
101. *Id.* at 851.
102. *Id.* at 868 (Brennan, J., dissenting).
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ing premise. The *Witt* decision offers the view that exclusion of jurors "because of their opposition to capital punishment is no different from excluding jurors for innumerable other reasons which result in bias." This argument is diametrically opposed not only to the constitutional standards of *Witherspoon* but also to the Court's traditional "super due process" analysis of all issues which relate to the death penalty. Justice Rehnquist's statement that "there is nothing talismanic about juror exclusion under *Witherspoon* merely because it involved capital sentencing juries" not only ignores precedent but also demonstrates an egregious insensitivity to human life.

The majority opinion *assumes* on the one hand that persons with reservations about imposing the death penalty cannot "conscientiously apply the law and find the facts" then goes even further to *assume* that death-qualified juries will be impartial and adequately protect the defendant's rights while also upholding the state's interests. The majority completely ignored the *Witherspoon* finding that a state that excludes all those opposed to capital punishment produces a jury that falls "woefully short of that impartiality to which the petitioner was entitled" and produces a jury "uncommonly willing to condemn a man to die." This language was quoted in *Adams* as well in reference to the effects of the Texas death-qualification procedure. In addition, nearly every study on death-qualification since *Witherspoon* has pointed to the conclusion that these juries are more likely to convict a defendant, and having convicted, more likely to sentence the defendant to death. With the new *Adams* test this effect will certainly be intensified since a much broader class of people may now be excluded for cause.

As the *Witt* dissent points out, the majority opinion all but ignores the sixth amendment analysis that is crucial to the *Witherspoon* holding and the entire death-qualification issue. Justice Rehnquist is only concerned with the impartiality of individual jurors and evades the sixth amendment's core concern, an impartial jury that is representative of a fair cross-section of the community. A jury's role in...
capital cases can never be underestimated. "One of the most important functions any jury can perform in making such a selection of life or death is to maintain a link between contemporary community values and the penal system . . . ."114 Justice Stevens recently reiterated this view: "[I]f the decision that capital punishment is the appropriate sanction in extreme cases is justified because it expresses the community's moral sensibility . . . it follows . . . that a representative cross-section of the community must be given the responsibility for making that decision."115 Broad death-qualification such as that envisioned by the majority in Witt threatens this fair cross section requirement of the sixth amendment and, in addition, drastically reduces the reliability factor of death penalty decisions demanded by the eighth amendment.

Justice Rehnquist's insensitive majority opinion not only jeopardizes the constitutional rights of capital defendants, it is also a personal affront to that segment of our country that views capital punishment as at least a questionable practice for a civilized government. The tone of Justice Rehnquist's opinion reflects the attitude of the Illinois trial judge in the Witherspoon case. Early in the voir dire the trial judge remarked, "'Let's get these conscientious objectors out of the way, without wasting any time on them.'"116 The Witt decision has returned us to the situation which existed before Witherspoon when persons were excludable for honestly conceding that the prospect of the death penalty could, in some way, affect their judgment of the facts or what they deem to be a reasonable doubt.

The death-qualification process is a complicated practice with complex psychological results that tend to favor only prosecutors in capital cases. The phrase "death-qualified jury" mirrors in and of itself the attitude expressed by Justice Rehnquist and the Witherspoon trial judge. The phrase connotes an inability on the part of prospective jurors to meet a state's standard to decide questions of life and death. Such jurors are told that they do not "qualify" to sit on a jury and be a part of decisions of great magnitude. This process, which takes place before any evidence is produced against a defendant, puts the death sentence foremost in the minds of future jurors and, as fellow jurors are stricken for being too faint-hearted regarding the death penalty, leads a jury to believe that criminal justice authority figures want only jurors who are "hard-nosed" about imposing the death sentence.117 Given the complex nature of this issue and the gravity of its impor-

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tance, the Court was obligated to be forthright in its analysis of prece-
dent and more adequately assess the ultimate effects of its holding on
the rights of capital defendants.

It defies reason that Justice Rehnquist would base his disapproval
of the Witherspoon standard on two of the Court's decisions which
upheld that standard and cited its language with approval. The
Court's opinion in Lockett v. Ohio,118 Justice Rehnquist notes, did not
refer to Witherspoon's "automatically" language but only the "unmis-
takably clear" language.119 The Adams opinion used somewhat different
language to describe the limitation on the state's power to exclude
scrupled jurors. The majority in Adams stated that the Witherspoon
line of cases "established the general proposition" that a juror could
not be excluded "unless those views [about capital punishment] would
prevent or substantially impair the performance of his duties as a ju-
ror in accordance with his instructions and oath."120 Justice Rehn-
qust thus determined that Adams had complicated the death-
qualification arena. This is a perplexing conclusion given the fact that
virtually all federal and state appellate courts had determined that
Adams clearly endorsed the Witherspoon standard drawn from foot-
note twenty-one.121 Neither Lockett nor Adams advocated or even hinted at
eliminating any aspect of the Witherspoon test. The Witt
decision is clearly not supported by the Court's own precedent.

B. Standard of Review of State Court Death-Qualification
Determinations

The second question before the Court in Witt related to the degree
of deference that a federal court should pay to a state trial judge's
determination of juror bias under Witherspoon. Witt petitioned for a
writ of habeas corpus under section 2254 of the Habeas Corpus Act.122
Pursuant to section 2254(d)123 any federal reviewing court must ac-
cord any findings of state courts on "factual issues" a presumption of
correctness.124

In order to answer the question of what degree of deference should
be accorded a trial judge's determination of bias pursuant to Wither-
spoon challenges under section 2254(d), the Court was required to de-
cide whether Witherspoon determinations were "questions of fact" or

121. Wainwright v. Witt, 105 S. Ct. 844, 886 (1985) (Brennan, J., dissenting). The dis-
sent cites numerous lower court opinions that interpret Adams as a clear en-
dersement of Witherspoon.
122. See supra note 15 and accompanying text.
123. See Addendum for full text of § 2254.
“mixed determinations of law and fact.” If the Court held that Witherspoon findings fell into the latter category, the section 2254(d) “presumption of correctness” standard would not apply.

It is at this point that Justice Rehnquist's majority opinion in Witt reveals its true colors. The majority opinion admits that under the Witherspoon test, with its “strict legal standard” and “very high burden of proof,” a trial judge’s determination of bias would appear to be a “mixed question of law and fact,” thus not subject to section 2254(d)’s “presumption of correctness.” However, since Justice Rehnquist eliminated the Witherspoon test and its strict legal standard by rewriting the Adams majority opinion, the new Adams test conveniently allows the Court to hold that future bias determinations on the issue of scruples against the death penalty are “questions of fact.”

Justice Rehnquist reaches his conclusion based on the Court’s holding in the case of Patton v. Yount. In Patton the respondent had been convicted of first-degree murder and sentenced to life imprisonment. Similarly, respondent petitioned for a writ of habeas corpus under section 2254, challenging the trial judge’s determination that the jury was impartial. The Court held that the trial judge's determination that three jurors were not biased due to media publicity surrounding the murder was a “question of fact” subject to a “presumption of correctness” under section 2254(d). The two reasons given by the Court to support this finding were, (1) that the trial judge reaches a determination as to juror excludability after extended voir dire, and (2) that the trial judge’s decision to exclude a juror is often made in part on the judge's determination of the credibility and demeanor of the prospective juror, a determination not susceptible to duplication or review at the appellate level.

The Witt majority then determined that “Patton's holding applies equally well to a trial court's determination that a prospective capital sentencing juror was properly excluded for cause.” The Court reached this conclusion for two reasons. First, the Court eliminated the Witherspoon “strict legal standard and very high standard of proof” found in footnote twenty-one of the Witherspoon opinion. The Court’s redefinition of Witherspoon’s legal standard was essentially an elimination of any substantial legal standard. Second, without such a strict legal standard, the trial judge's determinations of

125. Darden v. Wainwright, 725 F.2d 1526, 1528-30 (11th Cir. 1984).
128. Id. at 2885 (1984).
129. Id. at 2891.
130. Id. at 2892.
132. Id. at 855.
juror exclusion due to bias are now “factual issues” just as they were in *Patton*. The Court then concluded that “once it is recognized that excluding prospective capital sentencing jurors because of their opposition to capital punishment is no different from excluding jurors for innumerable other reasons which result in bias, *Patton* must control.”

The Court’s conclusion that exclusions for cause due to bias are indistinguishable follows perfectly with the Court’s reasoning earlier on in the *Witt* opinion. The Court stated that “the *Adams* standard is proper because it is in accord with traditional reasons for excluding jurors . . . .” Exclusions for cause due to a potential juror’s bias facilitates the “quest for jurors who will conscientiously apply the law and find the facts.”

The Court’s concern about seating a biased juror is well founded with respect to *Patton* and the capital sentencing jury at issue in Texas in the *Adams* opinion. Both of these juries were acting as fact-finders. “A state is authorized to excuse a fact-finder for ‘bias’ if she is inclined to distort the factfinding process in favor of a particular result.” Essentially, the Court has shown that today’s sentencing juries are much like the guilt determining juries in that they must be able to “conscientiously apply the law and find the facts.” Therefore, the Court was correct in holding that the standard for exclusion in *Patton* applies equally to a capital sentencing jury in Texas.

Texas, however, is not Florida. The *Witt* opinion involved a capital sentencing jury operating under Florida law. The Florida jury does not sentence but instead “recommends sentence to which state law requires some judicial deference.” Further, “nearly every other state in which juries sentence have as much discretion as the Illinois jury had in *Witherspoon*.”

As one commentator points out, “*Witt*’s use of the words ‘bias’ and ‘impartial’ in connection with both factfinding and sentencing, in an apparent effort to facilitate ‘merge[r]’ of the two, is . . . misconceived.” It is simply illogical to demand that discretionary capital sentencers be free from bias. Since the *Furman* and *Gregg* decisions,
the Court has emphasized twin objectives in its pursuit of constitutionally valid death penalty schemes. First, the procedure must be able to "rationally distinguish between those for whom death is an appropriate sanction and those for whom it is not."¹⁴³ Second, "it must allow the sentencer to consider the individual circumstances of the defendant, his background, and his crime."¹⁴⁴ These objectives are in part met by allowing the jury to be "the voice of the community."¹⁴⁵ The Court has often noted that "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..."¹⁴⁶ The voice or conscience of the community is necessarily expressed through its bias, the basis for its opinions and moral standards. It makes little sense for the Court to require capital sentencer discretion,¹⁴⁷ then in turn demand, as in Witt, that a sentencing jury be unbiased and impartial. The discretionary capital sentencer is not finding fact. "There is no objective right answer. The discretionary sentencing decision—life or death—is entirely subjective."¹⁴⁸

V. CONCLUSION

The Supreme Court in Wainwright v. Witt has granted trial judges nearly unfettered discretion in determinations of juror bias, based on a juror's feelings regarding the imposition of the death penalty. Literally any juror with the slightest hesitation about imposing the death penalty may validly be stricken for cause on the ground that the trial judge's intuition or hunch tells him or her that this juror might be unable to impartially find the facts and apply them to the law. Further, on appellate review, these determinations will be "presumed correct" even "where the record does not indicate the standard applied by a state trial judge."¹⁴⁹

In a country which has established that a jury must find that the accused is guilty "beyond a reasonable doubt," such a standard as that established in Witt should be intolerable. A trial judge under the Witt standard may find as a "question of fact" that a juror is biased based on that judge's mere hunch.

Numerous questions have been raised by the Witt opinion. Two justifications lay at the core of the Witt holding, the changed role of juries which now have limited sentencing discretion and the view that

¹⁴⁴. Id. at 3163.
¹⁴⁵. Id.
¹⁴⁶. Witherspoon v. Illinois, 391 U.S. 510, 519 (1968); see also notes 114-15 and accompanying text.
¹⁴⁷. Gillers, supra note 85, at 1076.
¹⁴⁸. Id. at 1078.
the capital versus non-capital distinction is no longer important. Given these contentions, one must ask why we continue to allow death-qualification at all? The majority of federal and state courts have held that the mere mention of possible punishment prior to guilt determinations distorts the jury's decision-making process, influences the juror's role as fact finder, and constitutes reversible error.\textsuperscript{150} Empirical evidence suggests that discussion of penalty prior to any determination of guilt undermines the fairness and impartiality of capital juries.\textsuperscript{151} Additionally, this question may be especially important in states that do not have juries sentencing the defendant. Some commentators have suggested that death-qualification is particularly inappropriate and unconstitutional in states where judges make sentencing decisions.\textsuperscript{152}

It should be noted that the death-qualification issue will once again be before the Court this term.\textsuperscript{153} The Witherspoon line of cases, presumably including Witt, only dealt with death-qualification in terms of sentencing juries. The Witherspoon case left open the question of whether the use of death-qualified juries to decide guilt offended the sixth amendment.\textsuperscript{154} The Eighth Circuit Court of Appeals in Grigsby v. Mabry,\textsuperscript{155} recently held that death-qualified juries are indeed violative of the sixth amendment and “conviction prone.” The Court recently granted certiorari to decide this issue.\textsuperscript{156}

The Witt holding, as well as the tone of the opinion, may have set the stage for the Grigsby appeal. Justice Rehnquist’s dissent in Adams and his majority opinion in Witt contains language that enables one to predict easily the outcome of the Court’s upcoming ruling in Lockhart v. McCree (the Grigsby appeal). In Adams, Justice Rehnquist stated, “I can see no plausible distinction between the role of the jury in the guilt/innocence phase of the trial and its role . . . in the sentencing phase.”\textsuperscript{157} In Witt the majority stated that “[t]he tests with respect to sentencing and guilt, originally in two prongs, have been merged . . . .”\textsuperscript{158} The Court in Witt effectively blurred the distinction between factfinding and sentencing.\textsuperscript{159} This language suggests the Court

\textsuperscript{150} See, e.g., Rogers v. United States, 422 U.S. 35 (1975); Chapman v. United States, 443 F.2d 917 (10th Cir. 1971); State v. Tims, 143 Ariz. 196, 693 P.2d 333 (1985); State v. Harris, 238 La. 720, 247 So. 2d 847 (1971); State v. Stub, 48 Ohio App. 2d 57, 355 N.E.2d 819 (1975); Toone v. State, 144 Tex. Crim. 8, 161 S.W.2d 90 (1942).

\textsuperscript{151} See Haney, supra note 117.

\textsuperscript{152} See Winick, supra note 88.

\textsuperscript{153} See infra note 156.


\textsuperscript{155} 758 F.2d 226 (5th Cir. 1985).


\textsuperscript{157} Adams v. Texas, 448 U.S. 38, 54 (1980).


\textsuperscript{159} See supra notes 142–49 and accompanying text.
may decide that the state's interest in implementing its capital sentencing scheme and in seating an impartial jury will justify the excusal of capital jurors with any hesitancy about the death penalty at the guilt determination phase as well as the sentencing phase. If the Court believes that hesitant capital jurors are not qualified to decide a defendant's sentence, the Court is not likely to trust such a juror as to the question of guilt either.

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Section 2254(d) of the Habeas Corpus Act provides:

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

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in the paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.