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Capital Case
Inclined to Grant

As there now appears to be a conflict on Witherspoon issue in Texas bet. State Courts & CA5 — & as several other pending Tex. cases present this issue (See p 9), I am inclined grant (but only on this issue).

Preliminary Memo

October 12, 1979 Conference
List 2, Sheet 2

See back —

No. 79-5175

CAPITAL CASE

(Stay of Execution Granted
by MR. JUSTICE POWELL)

ADAMS v. TEXAS	Cert to Texas Ct. of Crim. Appls (Dally for the court en banc) State/Criminal	Timely (with extension)

1. SUMMARY: Petr contends that (1) the exclusion of prospective jurors violated Witherspoon v. Illinois; (2) the prosecutor's failure to disclose a state witness' exculpatory statement violated Brady v. Maryland; and (3) there was insufficient evidence to support the jury's conclusion on one punishment issue.

2. FACTS & DECISION BELOW: Petr shot and killed a police officer, who had stopped him for driving without headlights, in the early morning hours of November 28, 1976. He was indicted for murder of a police officer in the lawful discharge of his duties, a capital offense under Texas law.

The Texas capital punishment scheme calls for a bifurcated trial on the issues of guilt and punishment. If the jury finds the accused guilty of a capital offense, it is then asked three statutorily-prescribed questions bearing on punishment.[1/] If it answers all three in the affirmative, a death sentence is automatically imposed; otherwise the sentence is life imprisonment.

1/ These questions are:

> (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 deceased.

Tex. Code Crim. Pro. Ann., art. 37.071(b).

Section 12.31(b) of the Texas Penal Code 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."

At voir dire, nine prospective jurors refused to take the § 12.31(b) oath and were excused for cause by the trial judge over the defendant's objections.

Although all veniremen stated that their deliberations on issues of fact would be "affected" by the potential sentence for capital murder, none stated that he was opposed to the death penalty under any and all circumstances. In fact, according to petr, three veniremen -- Mahon, Jenson, and Coyle -- stated that they favored the death penalty and would vote to impose it in a proper case. According to resp, Mahon stated that she would answer the three statutory questions in the negative if she had "any doubt" on the subject; Jensen stated that he would have to be persuaded "beyond all reasonable doubt" before voting yes; and Coyle stated that she "did not know" whether she could be an impartial juror.

Five other veniremen -- White, Andrews, Giuffrida, Riddle and Williams -- stated that although they were not philosophically opposed to the death penalty, they would have varying degrees of

difficulty in giving a positive answer to the statutory questions. One venireman -- McDonald -- initially stated that she opposed capital punishment. According to petr, she qualified this by stating that she could vote for death in an appropriate situation; according to resp, she stated that murder of a police officer is not such a situation.

Prior to trial, petr made a Brady motion for disclosure of any favorable evidence. The prosecutor stated that he had no exculpatory evidence, although in fact he had a written statement by Emily Miller, a prosecution eye-witness who identified petr at trial, that the perpetrator was "either a Mexican or a light-skinned black man." Since petr is white, Miller's statement bore on his defense of mistaken identity. Apparently this statement first came to light three days after Miller's testimony at trial, when petr's counsel asked the prosecutor for the written statements of the witnesses who had identified petr. The trial court denied petr's motion to have Miller's statement introduced into evidence, noting that petr had waived his rights to her further appearance and that she had moved to an unknown address. Consequently, the disputed statement was never shown to the jury.

At the punishment stage of the trial, the prosecutor introduced evidence on the three death penalty questions, including, in particular, the question of whether the accused would probably commit acts of violence in the future. The prosecutor's only evidence on this point, aside from the evidence

introduced during the guilt stage of the trial, was testimony of two psychiatrists who diagnosed petr as exhibiting sociopathic personality traits. Petr's evidence in mitigation was his past record -- which revealed only a drunk driving conviction and a short absence without leave from the Army -- and the testimony of his mother that he had been a "good son." The jury answered the statutory punishment questions affirmatively and petr was sentenced to death.

The Texas Court of Criminal Appeals affirmed the conviction and death sentence. It held, based on authority of previous Texas decisions, that the exclusion of jurors because of their failure to take the § 12.31(b) oath did not violate Witherspoon v. Illinois.

Nor did the Court of Criminal Appeals find a Brady violation. The prosecution had no duty to disclose Miller's statement as of petr's initial request, because under Texas procedure witness' written statements are specifically exempted from pretrial discovery. Even if petr could complain of the prosecutor's failure to disclose the statement earlier, petr could not do so after failing to make a timely request for the statement. Further, the court found that the statement, considered in light of the record as a whole, did not create a reasonable doubt as to petr's guilt.

Finally, the court found that the testimony of the two psychiatrists, "when considered with the evidence of the crime itself, which was a particularly senseless and motiveless killing,"

was sufficient to support the jury's conclusion, at the punishment phase, that petr would probably commit acts of violence in the future.

3. CONTENTIONS: (a) Petr contends that Witherspoon v. Illinois was violated by exclusion of the nine veniremen unable to swear that their deliberations on issues of fact would not be affected by the mandatory life imprisonment or death sentence for capital murder. Under Witherspoon,

> [T]he death sentence cannot be carried out if the jury that recommended or imposed it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty. . . . The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion.

391 U.S. at 522 & n. 21 (emphasis in original).

Petr cites, in this regard, Burns v. Estelle, 592 F.2d 1297 (CA 5 1979), in which CA 5 found that the exclusion of four veniremen who refused to take the § 12.31(b) oath violated Witherspoon. According to CA 5, the mere fact that a venireman states that she would be "affected" by the potential penalty is insufficient to justify challenge for cause, because

CA5

> [s]uch an ambiguous answer spans the range of possible effects on her from a mere heightening of the seriousness with which she might approach her deliberations as a juror, through conscientious and moral dilemmas foreseen, to an utter refusal to deliberate rationally at all.

Id. at 1301.

In petr's view, each of the nine veniremen here were improperly excluded under Witherspoon and Burns. None of the veniremen stated that he was irrevocably committed to vote against the death penalty in any and all circumstances. Indeed, the present case is stronger on its facts than Burns because several of the excluded veniremen here stated that they believed in capital punishment whereas the veniremen in Burns opposed capital punishment.

Resp says that § 12.31(b) excludes veniremen biased in favor of the death penalty as well as those opposing it. Further, the exclusion of these veniremen is consistent with the holding in Lockett v. Ohio, 438 U.S. 586, 595-597 (1978), in which the Court upheld against a Witherspoon challenge the exclusion of veniremen who would not take an oath to well and truly try the case and follow the law.

(b) Petr asserts that his rights under Brady were violated by the prosecutor's failure to disclose, pretrial, the written statement by eyewitness Miller identifying the perpetrator as a Mexican or light-skinned black. Petr concedes that, as a matter of Texas procedure, he was not entitled to Miller's statement

until after her direct testimony. Nor does he deny that his second request for the statement, made three days after Miller's testimony, was untimely. But petr argues that state law cannot override his right, under *Brady* and *Agurs*, to examine the statement prior to trial. Further, petr should not be held responsible for the lateness of his second request because it was induced by reliance on the prosecutor's purposeful misrepresentation that he had no exculpatory evidence.

Resp says that the prosecutor's culpability *vel non* for failing to disclose the statement is irrelevant. Rather, the question is whether, in light of the whole record, Miller's statement created a reasonable doubt as to petr's guilt. *United States* v. *Agurs*, 427 U.S. 97 (1976). Resp agrees with the court below that no reasonable doubt was created. There were two other identification witnesses besides Miller; her statement describing the suspect as black or Mexican was based on a view limited to a few seconds; and Miller and the other witnesses positively identified petr in a lineup and a photo display.

Resp also contends that at a hearing, with the jury excused, Miller testified that petr could be a Mexican or a light-skinned black. Resp suggests, citing *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), that in light of this statement, petr's failure to object to Miller's subsequent in-court identification constituted a procedural default.

(c) Petr asserts that there was no competent legal evidence to support the jury's determination at the punishment

stage that petr would probably commit acts of violence in the future. The testimony of the two psychiatrists was not competent, says petr, under Addington v. Texas, 47 U.S.L.W. 4473, 4476 (May 1, 1979). In Addington, the Court gave as one reason for refusing to require a "reasonable doubt" standard for involuntary civil commitment the fact that

> "[g]iven the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous."

By like reasoning, says petr, the testimony of psychiatrists cannot establish beyond a reasonable doubt the probability of petr's future violent behavior.

Resp answers that the jury at the punishment stage had before it not only the psychiatrists' testimony, but also evidence introduced during the guilt stage showing that petr had committed a particularly motiveless and outrageous crime. Petr's reliance on Addington is misplaced since under the reasonable doubt standard applicable in a criminal case the risk of error to the accused from untrustworthy evidence is minimized.

4. DISCUSSION: (a) The Witherspoon issue is presented in four other Texas cases set for the October 12 Conference: Ervin v. Texas, No. 78-6777; Wilder v. Texas, No. 79-5002; Armour v. Texas, No. 79-5007; and Bell v. Texas, No. 79-5199. There seems to be a clear conflict between CA 5 in Burns and the Texas Court of Criminal Appeals.

This conflict probably will not result in disparate treatment of prisoners, because those sentenced to death in the Texas courts will be able to challenge their sentences on Witherspoon grounds in federal habeas corpus. Nor, for the same reason, is there a strong likelihood that the death penalty will be imposed unconstitutionally. On the other hand, it is a highly unsatisfactory situation when State and federal courts within a State differ so markedly over an issue of great importance to the State's administration of the criminal law. Further, the constitutional standard is presently in a state of some uncertainty, as evidenced by the disagreement between CA 5 and the Texas court. This Court may wish to grant cert in order to resolve the conflict and clarify the law in this area.

(b) If there is an important question on the second issue, it would be whether a state procedural rule banning disclosure of witness' written statements until after direct examination violates the defendant's rights under Brady and Agurs. Resp has not explained the purpose of this rule, but it would seem designed to facilitate cross-examination -- by requiring disclosure of written statements after the direct -- while at the same time protecting against disclosure of statements of potential witnesses that a party ultimately decides not to call. If this is the basis of the Texas rule, it is arguably at odds with the underlying principle of Brady, which helps ensure a fair trial by disclosing exculpatory evidence to the defendant regardless of whether the source of that information is called to testify.

Even if there was a technical *Brady* violation, petr is not entitled to relief unless he has been prejudiced. Although the court below held that Miller's statement did not create a reasonable doubt as to petr's guilt, the question is not entirely free from uncertainty. When the accused's defense is alibi and mistaken identity, an eyewitness' statement that the perpetrator came from different racial stock would seem strongly exculpatory. Petr was implicated by his partner in wrongdoing, but this witness was, to say the least, not particularly credible. The other three identification witnesses, including Miller, caught relatively fleeting glances of the perpetrator sitting in a car, presumably illuminated by headlights, as they drove by in their cars. If Miller's view was good enough to make her statement reliable, as resp at one point seems to argue, then the statement supports petr's defense of mistaken identity. If her view was so poor as to mistake the race of the perpetrator, as resp at another point argues, then the statement casts doubt not only on Miller's testimony but also on the testimony of the other witnesses who were in no better position to observe the perpetrator than was she.

If there was a *Brady* violation, and if the violation was prejudicial, there remains the question of whether petr forfeited this claim through the procedural defaults of not timely requesting the statement after Miller's direct testimony (as the court below held) or not objecting to Miller's in-court identification of petr (as resp now argues). As to both, petr has a not

unconvincing argument that he was entitled to rely on the prosecutor's pretrial statement, later shown to be false, that the prosecutor possessed no exculpatory information.

(c) The sufficiency of the evidence on the statutory punishment question seems uncertworthy. Even if no psychiatrists had testified, the jury would have been fully justified in concluding from the particularly senseless and violent nature of the crime that petr would probably commit violent acts in the future.

There is a response.

10/2/79 Miller Opinion in Petition

ME

Discuss:

(1) The petn & response in Armour, No. 79-5007, did not mention the clash between CA5 & Tex. Ct. Crim. App. over the Witherspoon issue. If the Court takes that case, which is more certworthy than this one, it could also address this conflict.

(2) The Brady claim here is substantial, but perhaps not independently certworthy, given the possibility of harmless error.

I'd grant & hold for Armour. If the Court decides the Witherspoon issue for both petrs, it can avoid the more specific Brady question here. – Greg

October 12, 1979

Court ....
Argued ...., 19...
Submitted ...., 19...

Voted on...................., 19...
Assigned ...., 19...
Announced ...., 19...

No. 79-5175

ADAMS

vs.

TEXAS

CAPITAL CASE - stay granted by Justice Powell. Time for filing extended by Justice Powell until 8/7/79.

Potter thinks that until bifurcated procedure, Witherspoon does not apply.

I expressed my concern. Byron changed vote to relist to give him time to think.

Relisted for Byron + T. M.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	AFF	MOTION G	D	ABSENT	NOT VOTING
Burger, Ch. J.			✓										
Brennan, J.			Vacate										
Stewart, J.			✓										
White, J.			✓										
Marshall, J.		✓											
Blackmun, J.			✓										
Powell, J.													
Rehnquist, J.			✓										
Stevens, J.			✓										

Relist for TM

I'll await writing

November 9, 1979

Court .... Voted on.................., 19...

Argued ...., 19... Assigned ...., 19... No.79-5175

Submitted ...., 19... Announced ...., 19...

ADAMS

vs.

TEXAS

CAPITAL CASE - stay granted by Mr. Justice Powell. Relisted for Mr. Justice Marshall.

Relist for T. M.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

November 21, 1979

Court ....

Argued ...., 19...

Submitted ...., 19...

Voted on................., 19...

Assigned ...., 19...

Announced ...., 19...

No79-5175

ADAMS

vs.

TEXAS

CAPITAL CASE - stay granted by Mr. Justice Powell. Relisted for Mr. Justice Marshall.

Relisted for T. M.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

November 30, 1979

Court .... Voted on ...., 19...

Argued ...., 19... Assigned ...., 19... No. 79-5175

Submitted ...., 19... Announced ...., 19...

ADAMS

vs.

TEXAS

CAPITAL CASE - stay granted by Mr. Justice Powell. Relisted for Mr. Justice Marshall.

P.S. thinks Witherspoon has no application to a bifurcated trial such as in Texas. He would grant & affirm on this issue. We have denied many of these cases on theory that Witherspoon doesn't apply.

Grant

Relisted for P.S. to select good Texas case — & limit to validity of statute. Is doctrine of Witherspoon applicable?

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.		✓											
Brennan, J.													
Stewart, J.		✓											
White, J.		✓	"plain" – wants argument										
Marshall, J.													
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											

There is conflict between Tex. Ct Crim/appeals & CA5 as to whether Witherspoon applies to the bifurcated procedure of the Texas death penalty —

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: 21 NOV 1979

Recirculated: ________

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Reviewed LFP 11/24

RANDALL DALE ADAMS *v.* STATE OF TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 79-5175. Decided November —, 1979

Join three to resolve conflict

MR. JUSTICE MARSHALL, dissenting.

I continue to adhere to my view that the death penalty is unconstitutional in all circumstances. In addition, I believe that the sentence of death in this case must be vacated under the standards set forth in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). In *Witherspoon* we held that a death sentence could not constitutionally be carried out "if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.*, at 522. Because a jury deprived of those with general objections to the death penalty would be unable to "express the conscience of the community on the ultimate question of life or death," *id.*, at 519, we concluded:

> "The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion." *Id.*, at 522, n. 21 (emphasis in original).

In *Davis* v. *Georgia*, 429 U. S. 122 (1976), we held that a sentence of death would be invalidated by the exclusion of a

The question whether the Tex. statute requires more than Witherspoon allows appears certworthy, particularly (over)

single veniremen who should not have been excluded under *Witherspoon*. See also *Maxwell* v. *Bishop*, 398 U. S. 262 (1970); *Boulden* v. *Holman*, 394 U. S. 478 (1969).

In this case, the trial court, upon motion by the prosecution, excluded for cause veniremen who should have been allowed to serve under the standards of *Witherspoon* and its progeny. Several of those excluded indicated that they would vote for the death penalty in a proper case. Some expressed a belief in the propriety of that penalty. Others testified that they could and would set aside their personal feelings and resolve the pertinent issues on the basis of the facts notwithstanding the punishment that might be imposed as a result. More flagrant violations of *Witherspoon* cannot easily be imagined.*

* [illegible] excerpted from the [illegible] Transcript of Voir Dire Examination [illegible]

Q. [illegible]

A. Well, [illegible] depends on the circumstances of the case. [illegible] they should have the death penalty [illegible] It depends on the case [illegible]

Q. [illegible] recognized by the law [illegible] for the death penalty if the facts and circumstances called for it, would you be in favor of the death penalty?

A. [illegible] I would.

Q. Now, how long [illegible] the death penalty [illegible]

A. Well, I think [illegible] for the death penalty in [illegible]

Q. [illegible]

A. [illegible]

Q. [illegible] you would be in favor of the death penalty?

A. [illegible] proper case [illegible]

Q. [illegible] death penalty [illegible]

The trial court based the exclusion on a provision of the Texas Penal Code which states: "Prospective jurors shall be informed that a sentence of life imprisonment or death is [illegible]

[illegible]

[illegible] prospective jurors were then informed that under Texas law the [illegible] three questions [illegible] the punishment [illegible] The death sentence may be imposed [illegible] questions are answered [illegible] [illegible] The three questions [illegible] whether the conduct of the Defendant [illegible] deliberately and with the reasonable expectation that the death of the deceased or another would result; [illegible] whether there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society; and [illegible] whether the conduct of the Defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." [illegible]

"Q. Now, do you feel [illegible] that you could [illegible] evidence presented [illegible] the Defendant [illegible] guilty along with the other members of the jury [illegible] State proved [illegible] that the [illegible] answers to those three questions [illegible] would you answer those questions [illegible] knowing that [illegible] will then be sentenced to death?

"A. Well, [illegible]

"Q. [illegible]

[illegible]

"A. Well, I don't think so. I don't think it would [illegible]

[illegible]

[illegible]

"A. Well, [illegible]

mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that a mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." Texas Penal Code Ann. § 12.31 (b) (1974). This standard is plainly inconsistent with *Witherspoon* and its progeny. See *Boulden* v. *Holman*, *supra*, 394 U. S., at 482–484. A number of the veniremen excluded in the present case should have been allowed to serve under *Witherspoon*: they were "willing to *consider* all of the penalties provided by state law" and were in no sense "irrevocably committed . . . to vote against the penalty of death." As indicated, several specifically indicated that they approved of the death penalty and would be willing to vote for it in appropriate cases. The exclusion of these jurors resulted in precisely the sort of unrepresentative "hanging jury" that the Court condemned in *Witherspoon*. 391 U. S., at 523.

I would grant certiorari and vacate the sentence of death in this case.

I had heard the facts that were presented [illegible] I [illegible] say that I was [illegible] as I did not know when it came right down to it and if there was any doubt in my mind about one of these questions that I would be [illegible] by life or death. If there was any doubt in my mind about one of these questions that were asked, then I might have a tendency to say no to one of them if there was a doubt in my mind there . . . .

[illegible]

At that point the prospective juror was excused for cause. It is these [illegible] that, according to respondent, satisfy the requirements of *Witherspoon*. See also, e. g., Tr. [illegible] (prospective juror states that he would vote for the death penalty in a proper case and that he would answer all three questions according to the evidence, but he is excluded because his deliberations would be affected [illegible]); Tr. 1379; Tr. 1548; Tr. 2961–2962; Tr. 3043–3153.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: ______

Recirculated: 29 NOV 1979

P. 4-5 Join 3 to resolve conflict bet. Texas Courts and CA 5 on Witherspoon

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

RANDALL DALE ADAMS *v.* STATE OF TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 79-5175. Decided November —, 1979

LFP 11/29

MR. JUSTICE MARSHALL, dissenting.

I continue to adhere to my view that the death penalty is unconstitutional in all circumstances. In addition, I believe that the sentence of death in this case must be vacated under the standards set forth in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). In *Witherspoon* we held that a death sentence could not constitutionally be carried out "if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.*, at 522. Because a jury deprived of those with general objections to the death penalty would be unable to "express the conscience of the community on the ultimate question of life or death," *id.*, at 519, we concluded:

> "The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion." *Id.*, at 522, n. 21 (emphasis in original).

In *Davis* v. *Georgia*, 429 U. S. 122 (1976), we held that a sentence of death would be invalidated by the exclusion of a

Adds a fn. at the end. Greg

single veniremen who should not have been excluded under *Witherspoon*. See also *Maxwell* v. *Bishop*, 398 U. S. 262 (1970); *Boulden* v. *Holman*, 394 U. S. 478 (1969).

In this case, the trial court, upon motion by the prosecutor, excluded for cause veniremen who should have been allowed to serve under the standards of *Witherspoon* and its progeny. Several of those excluded indicated that they would vote for the death penalty in a proper case. Some expressed a belief in the propriety of that penalty. Others testified that they could and would set aside their personal feelings and resolve the pertinent issues on the basis of the facts, notwithstanding the punishment that might be imposed as a result. More flagrant violations of *Witherspoon* cannot easily be imagined.[1]

---

[1] The following exchange, excerpted from the examination of one prospective juror, is taken from the Voir Dire Examination, at 711:

"Q. ... Let me ask you now, if you will tell me what your feelings are about the death penalty?

"A. Well, I'm not real sure. It depends on the circumstances of the case. There are some I feel that yes, they should have the death penalty, but I think that others shouldn't. It depends on the case, on the situation.

"Q. ... If you were to sit on a case ... which is recognized by the law as a case that could call for the death penalty if the facts and circumstances called for it, would you be in favor of the death penalty?

"A. Sometimes, yes, I would.

"Q. Now, how long have you been in favor of the death penalty in certain types of cases?

"A. Well, I think there's always been a need for the death penalty in certain types of cases.

"Q. Have you always been in favor of it?

"A. Yes.

. . . . .

"Q. Are you saying then that if you were selected to serve on the jury and it was the proper case that you would be in favor of the death penalty?

"A. Yes, if it's the proper case, yes, I think so.

. . . . .

"Q. ... And you have told me that you believe in the death penalty, would be in favor of the death penalty if the facts and circumstances called for it in a particular case.

The trial court based the exclusion on a provision of the Texas Penal Code which states, "Prospective jurors shall be informed that a sentence of life imprisonment or death is

Texas Code

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that a mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." Texas Penal Code Ann. § 12.31 (b) (1974). This standard is plainly inconsistent with *Witherspoon* and its progeny. See *Boulden* v. *Holman*, *supra*, 394 U. S., at 482–484. A number of the veniremen excluded in the present case should have been allowed to serve under *Witherspoon*: they were "willing to *consider* all of the penalties provided by state law" and were in no sense "irrevocably committed . . . to vote against the penalty of death." As indicated, several specifically indicated that they approved of the death penalty and would be willing to vote for it in appropriate cases. The exclusion of these jurors resulted in precisely the sort of unrepresentative "hanging jury" that the Court condemned in *Witherspoon*. 391 U. S., at 523.

[illegible]

[illegible]

[illegible]

[illegible]

I would grant certiorari and vacate the sentence of death in this case.

Linda - attach to Adams

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 3, 1979

MEMORANDUM TO THE CONFERENCE

Re: Witherspoon Issue

Among the Texas capital cases now pending, No. 79-5175, Adams v. Texas, seems best to present the Witherspoon issues that we discussed at the Conference last Friday.

Accordingly, I would be inclined to vote to grant certiorari in that case limited to the following questions:

(1) Is the doctrine of Witherspoon v. Illinois, 391 U.S. 510, applicable to the bifurcated procedure employed by Texas in capital cases?

(2) If so, did the exclusion from jury service in the present case of prospective jurors pursuant to Texas Penal Code § 12.31(b) violate the doctrine of Witherspoon v. Illinois, supra?

P.S.

P.S.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 4, 1979

RE: No. 79-5175 Adams v. Texas

Dear Potter:

I agree with the proposed questions.

Sincerely,

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

OK with me also

December 4, 1979

Re: 79-5175 - Adams v. Texas

MEMORANDUM TO THE CONFERENCE:

I find Potter's proposed questions in his memo dated December 3, 1979 satisfactory.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 5, 1979

Re: No. 79-5175 - Adams v. Texas

Dear Potter:

I agree with the proposed questions.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

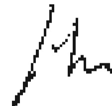
December 5, 1979

Re: 79-5175 - Adams v. Texas

Dear Potter:

I agree with the proposed questions.

Respectfully,



Mr. Justice Stewart

Copies to the Conference

in light of the conflict between CAS & the Tex. Ct. Crim. App.

Greg

December 7, 1979

Court .... *Voted on*.................., *19*...

Argued ...., *19*... *Assigned* ...., *19*... No. 79-5175

Submitted ...., *19*... *Announced* ...., *19*...

ADAMS

vs.

TEXAS

CAPITAL CASE - stay granted by Mr. Justice Powell. Relisted for Mr. Justice Stewart.

Grant with Questions proposed by P.S. ~~[illegible]~~

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.		✓											
Stewart, J.		✓											
White, J.			✓										
Marshall, J.		✓											
Blackmun, J.			✓										
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											

JS 3/12/80

MEMORANDUM

To: Mr. Justice Powell

Re: No. 79-5175, Adams v. Texas

The first question at issue in this case is whether Witherspoon v. Illinois is applicable to the bifurcated procedure employed by Texas in capital cases. The briefs are not terribly helpful in resolving this question. The petr argues that Witherspoon is applicable. The State suggests some reasons why Witherspoon may be inapplicable to the Texas system, but generally concedes the applicability of Witherspoon.

According to your November 30, 1979 Conference notes, Justice Stewart "thinks Witherspoon has no application to a bifurcated trial such as in Texas. He would grant and affirm on that issue. We have denied many of these cases on the theory

that Witherspoon doesn't apply." Nevertheless, the Court has applied Witherspoon in a post-Gregg Georgia death case, although it did not explicitly consider the applicability of Witherspoon. See Davis v. Georgia, 429 U.S. 122 (1976).

In order to aid my preparation of a Bench Memorandum, I wondered if the prevailing view at Conference when this case was discussed was (i) that Witherspoon does not apply to any post-Gregg bifurcated statute, because jury discretion has been substantially limited, or (ii) that Texas is unique, because its juries merely answer three questions, but do not vote directly whether or not to impose the death penalty. See Jurek v. Texas, 428 U.S. 262 (1976).

(Although I'm not sure, I believe this is why P.S. believes Witherspoon is inapplicable.

Reviewed 3/21
Jon's views:
1. Witherspoon applies. §12.31(b) requires jurors at sentencing stage to answer three fact questions (p 2) & if all these are answered affirmatively the death sentence is automatic. Gregg, Jurek & Lockett emphasized that jurors must have discretion to consider mitigating circumstances, & in Jurek we found that the Texas Cts had construed 12.3(b) to allow this consideration.

JS 3/21/80

Jon thinks that in view of requirement that jurors must have some discretion (e.g. to decide that a Δ - say because of youth & record (mitigating facts) - was not likely to "commit (future) acts of violence, Witherspoon applies.

Texas' brief, tho conceding curiously that Witherspoon applies, argues that 12.3(b) only requires answers to these factual questions & a juror may be excused if he says he can't answer these; and this satisfies Witherspoon. (There seem to me to be gaps in logic of both Jon's & Texas' views)

BENCH MEMORANDUM

If the juror used as example by Jon had been willing to take oath to answer the Qs, he should have been seated.

To: Mr. Justice Powell

Re: No. 79-5175, Adams v. Texas

1. QUESTIONS PRESENTED: (1) Is the doctrine of Witherspoon v. Illinois, 391 U.S. 510, applicable to the bifurcated procedure employed by Texas in capital cases? (2) If so, did the exclusion from jury service in the present case of prospective jurors pursuant to Texas Penal Code § 12.31(b) violate the doctrine of Witherspoon v. Illinois, supra?

Jon must be saying 12.3(b) is invalid - tho we upheld it in Jurek.

2. Juror improperly excluded. Jon thinks juror Jenson (p 3-4) should have been seated.

2. BACKGROUND. Petr was indicted for the murder of a Dallas police officer. During voir dire before the trial, the Texas capital punishment statute was explained to prospective jurors. Under Texas law, as approved in Jurek v. Texas, 428 U.S.

262 (1976), murder trials are bifurcated. After the jury has determined that a defendant is guilty, a separate sentencing hearing is held before the trial jury. At that stage, the jury is called upon to ask three questions:

> (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 deceased.

428 U.S. at 269. If the jury unanimously answers "yes" to each question then the death penalty is automatically imposed. If the jury votes "no" to any question, then the defendant is sentenced to life imprisonment.

After this procedure was explained, potential jurors were examined for complaince with Tex. Penal Code § 12.31(b) which provides that "[p]rospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." Ten jurors were excused because they could not in good conscience take such an oath.

§12.31(b)

The questioning of prospective juror Forrest Jenson

Jenson used by JOC as example

illuminates application of § 12.31(b). When asked whether he favored use of the death panalty, Jenson said "Well, I think I believe in letting the punishment fit the crime, I've never had to decide whether or not somebody lived or dies and I don't know if I could or not. I feel like I could if I had to." App. at 9. Subsequently, he stated "I do feel that society has to have some deterrent to crime and as a result, probably capital punishment is the only means of deterrent we have." Id. When asked whether he could answer the three statutorily mandated questions without being influenced by the outcome of the test, Jenson said "Yeah, I think I would." Id., at 11. But when asked whether personal feelings about the death penalty would effect his deliberations during the sentencing stage, Jenson said "Well, I think it probably would because afterall, you're talking about a man's life here. You definitely don't want to take it lightly. Now, if you went in here and, you know, if he was going to get life and probably paroled in some years, it puts a whole new light on the subject. But when you have got the death penalty to deal with, I think you have got to be pretty certain." Id., at 12. Jenson also said "But still again, if---if he's proven guilty, you know, beyond all reasonable doubt to me, and I think my conscious could clearly--I could vote--I think I could vote yes to all three questions. But, like I say, that's my conscious I'm dealing with." Id., at 13. When asked if his deliberations would be affected if he believed that death was not warranted, Jenson

replied, "Well, I'm human just like everybody else...I think it will probably effect anybody's." Id. Subsequently, Jenson said that he could not take the oath required by § 12.31(b). Accordingly, Jenson was excused for cause.

Could not take oath

After petr was convicted and sentenced to death, the state court of criminal appeals rejected petr's claim that the exclusion of witnesses pursuant to § 12.31(b) violated the command of Witherspoon v. Illinois. The court relied upon its earlier cases holding that application of § 12.31(b) did not violate Witherspoon.

3. DISCUSSION.

A. Is the doctrine of Witherspoon v. Illinois, 391 U.S. 510, applicable to the bifurcated procedure employed by Texas in capital case?

In Witherspoon v. Illinois, this Court considered the operation of a state statute that excluded each juror who "has conscientious scruples against capital punishment, or that he is opposed to same." Under the Illinois sentencing procedures the trial jury made the final determinaton whether a murderer would receive life imprisonment or death. The Court noted that "the jury is given broad discretion to decide whether or not death is 'the proper penalty' in a given case, and a juror's general views about capital punishment play an inevitable role in any such decision." Id., at 519. The exclusion of jurors who had general views opposed to infliction of the death penalty was

troublesome because "[g]uided by neither rule or standard,...a jury that must choose between life imprisonment and capital punishment can do little more--and must do nothing less--than express the conscience of the community on the ultimate question of life or death." Id. Consequently, the Court held "that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Id., at 522.

The Court explicitly stated the bounds of its holding in Witherspoon:

> The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out....
>
> We repeat, however, that nothing we say today bears on the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakeably clear (1) that they would automatically vote against the imposition of captial 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., at 522 n.21. Thus, Witherspoon was premised upon the theory that the jury had such substantial discretion to choose a verdict of life imprisonment or death that a defendant did not

receive a fair trial if the jury was systematically chosen to exclude jurors who had qualms about the imposition of death. Witherspoon has been discussed by this Court in two cases before the decision in Gregg v. Georgia and two cases since. In Boulden v. Holman, 394 U.S. 478 (1969) the Court remanded an Alabama death case for consideration in light of Witherspoon. In state proceedings, all jurors with a "fixed opinion" against capital punishment had been excused. Id., at 481. The Court remanded an Arkansas death case for application of Witherspoon in Maxwell v. Bishop, 398 U.S. 262 (1970)(per curiam). In that case a number of jurors had been excused, one of whom said that he thought scruples about the death penalty might influence his deliberations. Id., at 264.

The Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), invalidated the death penalty procedures upon which Witherspoon was based. The Court's subsequent decision in Gregg v. Georgia, 428 U.S. 153 (1976) approved the use of death penalty schemes that left the jury with substantially less discretion than the statutes voided in Furman. The Gregg plurality opinion stated that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Id., at 189. The plurality recognized that jury sentencing has been considered

desirable in order "'to maintain a link between contemporary community values and the penal system,'" Id., at 190, and suggested that a jury sentencing would be constitutional in a "system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide the use of its information." Id., at 195. The Georgia statute controls jury discretion by forcing the jury to find a statutory aggravating factor and allowing it to consider mitigating evidence.

In Jurek v. Texas, the Court also approved the Texas death penalty statute. As noted above, the Texas statute differs from the Georgia scheme. In Texas, the jury never votes whether the sentence a person to life imprisonment or death. Depending upon its answers to three statutorily prescribed questions, one of the sentences must be applied automatically. But the plurality noted that the presence of statutory aggravating circumstances was not sufficient: "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Id., at 271. Although the Texas statute does not speak explicitly about mitigating evidence, the Court found that mitigating evidence played a role in the jury's determination of the second statutory question, supra at 2.

The recognition that some jury discretion is

constitutionally mandated provided the rationale for the Court's decisions in Woodson v. North Carolina, and Roberts v. Louisiana. The plurality in Woodson found three constitutional flaws in North Carolina's mandatory death penalty statute: (i) the use of a mandatory death sentence departs from contemporary values, id, at 301, (ii) because juries faced with mandatory statutes often refuse to convict at all, the mandatory penalty would be applied arbitarily, id., at 302-303, and (iii) the statute failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death," id., at 303. Discussing the third point, the plurality relied upon the difference between death and life imprisonment to conclude that "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Id., at 305. See also Roberts v. Louisiana, 428 U.S. at 335-336.

In Davis v. Georgia, 429 U.S. 122 (1976)(per curiam) the Court applied Witherspoon to a Geroqia death case. In that case, the Georgia Supreme Court found a Witherspoon error, but delared it harmless. The Court reversed. Neither the Court's opinion nor the dissent questioned whether Witherspoon was appropriate where the death penalty had been imposed pursuant to procedures approved in Gregg.

In Davis we did not question whether Witherspoon was appropriate.

In Lockett v. Ohio, 438 U.S. 586 (1978) the Court held

that Witherspoon was not violated where jurors were excluded for failure to take an oath "to well and truely [sic] try this case...and follow the law." Id., at 595. The Court noted that Witherspoon allowed jurors to be excluded if they could not make an impartial decision as to the defendant's guilt, and held that these juror's were properly excluded where they made it unmistakeably clear that they could not be trusted to abide by existing law and follow the instructions of the trial judge. Lockett is also notable because four Members of the Court concluded that a constitutional death penalty statute must allow all mitigating circumstances to be considered. The plurality stated that "in all but the rarest kind of capital case, [the sentencer must] not be precluded from considering as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers...." Id., at 604.

The question whether Witherspoon is applicable to a post-Gregg sentencing statute depends upon the role of the jury. Pre-Furman the jury exercised complete discretion, and, accordingly, due process demanded that all sectors of public opinion concerning the death penalty be representated. Had the Court approved the North Carolina statute considered in Woodson, Witherspoon would have become irrelevant, because the jury would have exercised no discretion. But the Gregg cases and Lockett clearly envision an important, if limited, role for the jury.

In Lockett

Q turns on role of the jury

The jury still acts as "a link between contemporary community values and the penal system,'" Gregg, 428 U.S., at 190, but its discretion is limited in order to guard against arbitrary verdicts. The jury must have the discretion, however, to consider "any aspect of the defendant's character or record and any of the circumstances of the offense...." Lockett, 438 U.S., at 604.

Witherspoon ensures that a person with general objections to the imposition of the death penalty is not excluded from the jury. So long as the jury's role, even if substantially limited from the pre-Furman era, encompasses the decision whether death is an appropriate punishment for a convicted defendant, then I believe that the rationale of Witherspoon survives. I believe that the principle of Witherspoon prohibits a state from excluding juror's who harbor general reservations about imposition of the death penalty, but who are willing to exercise the limited discreton recognized in Gregg.

Juror Jenson - but he refused to take statutory oath

Mr. Jenson's statements, supra 2-4, illustrate the applicability of Witherspoon. Jenson was willing to impose the death penalty, and willing to answer the three questions fairly, but he stated that "when you have got the death penalty to deal with, I think you have got to be pretty certain." App., at 12. Jenson's comments indicate no more than his belief that the difference between life imprisonment and death demands "a

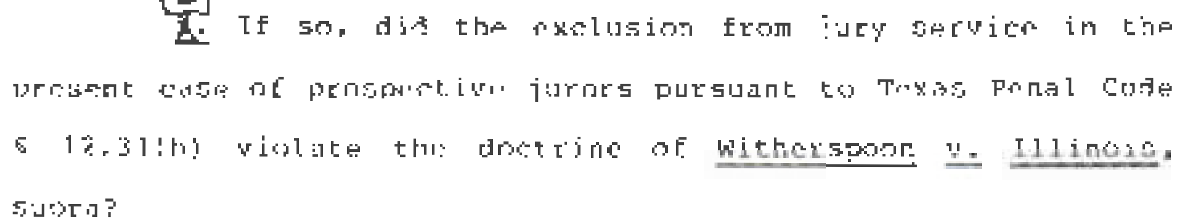
corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson, 428 U.S., at 305. In that sense, it seems that the irrevocability and severity of death should "affect" a juror's determination whether a convicted murderer deserves capital punishment.

Difference between Ga + Texas

In its brief, the State suggests that the Texas scheme permits the jury to play a different role in the imposition of the death penalty. In Texas, unlike Georgia, the jury does not vote whether to impose life or death, it merely answers three questions. Depending on the answers, life imprisonment or capital punishment is automatically imposed. But Texas does not impose a mandatory death penalty. If it did, its statutory scheme would have run afoul of the plurality's reasoning in Woodson and Roberts. The Texas plan survived precisely because the plurality believed it left the jury with the same kind of discretion permitted by the Georgia statute. Thus, the plurality in Jurek stated that "the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors." 428 U.S. at 272. As noted above, the plurality upheld the Texas statute because it allowed consideration of mitigating factors in resolution of the question "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Id. Because the jury

thus has been given the same discretion as Georgia juries, I do not believe that Witherspoon is applicable to Georgia but not Texas.

I would conclude, therefore, that the role of a jury in Texas includes the determination whether death is an appropriate punishment for a convicted defendant. Thus the jury exercises real, if limited, discretion. Consequently, I believe that the State cannot bar from the jury all persons who, as in Witherspoon, have "conscientious scruples against capital punishment," so long as that person is "willing to consider all of the penalties provided by state law, and ...not be irrevocably committed, before the trial has begun, to vote against the penalty of death...." Witherspoon, 391 U.S. at 522 n.21.



B. If so, did the exclusion from jury service in the present case of prospective jurors pursuant to Texas Penal Code § 12.31(b) violate the doctrine of Witherspoon v. Illinois, supra?

Assuming that Witherspoon is applicable, then I believe that the application of the Texas statue in this case is unconstitutional. I believe that Witherspoon as applied to post-Gregg death penalty statutes prohibits the States from excluding jurors who would exercise the type of discretion expressly contemplated in Gregg, Jurek, Woodson, and Lockett. Because I believe that those cases contemplate that jurors will consider

in each case whether death is an appropriate penalty for a convicted murderer, I also conclude that jurors should be more certain that death is the proper penalty. Such judgments do not approach the standardless and arbitrary discretion struck down in Furman.

The State argues that the statute is neutral and simply ensures that a juror will follow the standards of the Texas death statute. But I think that the Texas statute does more by eliminating from the jury some persons who wish to exercise the kind of discretion contemplated in Gregg and Jurek. In this case juror Jenson merely demonstrated that he would be properly responsive to an argument that the death penalty would be excessive punishment for the convicted murderer. Supra, at 10-11. In striking that juror, I believe that Texas violated Due Process.

Although I have not surveyed the voir dire of other jurors in this Bench Memorandum, Davis v. Georgia held that the exclusion of even one potential juror in violation of Witherspoon voids the imposition of the death penalty. See 429 U.S. at 123.

4. SUMMARY. The questions in this case are (1) is the doctrine of Witherspoon v. Illinois, 391 U.S. 510, applicable to the bifurcated procedure employed by Texas in capital cases? (2) If so, did the exclusion from jury service in the present case of prospective jurors pursuant to Texas Penal Code § 12.31(b)

violate the doctrine of Witherspoon v. Illinois, supra? Witherspoon was premised upon the principle that jurors represent the conscience of the community and, therefore, that Due Process demands that a jury represent a reasonable cross-section of the community. Although jury discretion has been limited by the Gregg cases, the jury still remains a link to the consicence of the community when it decides whether death is an appropriate punishment for a convicted murderer. Thus, Witherspoon remains applicable in death penalty cases. In this case, application of the Texas statute violated Witherspoon because it excluded jurors who were willing to exercise the discretion contemplated by Gregg, Jurek, and Woodson.

3/24/80

79-5175 Adams v Texas (Jon's views that are persuasive)

Two Q:

1. Does Witherspoon apply to Ga statute (Gregg)

Under Ga. statute, jury never has to impose C/P. Thus, jury has substantial discretion. Witherspoon applies.

2. Is Texas sufficiently different from Ga?

Must look to Jurek opinion. We had to decide whether Texas statute was more like Ga than N.C., as invalidated in Woodson.

In Jurek, we said if a statute would allow consideration only of aggravating factors, it would be invalid.

Language in Jurek that a Ct. could consider mitigating factors is not based on language of statute. We interpreted Q 2 as allowing this, relying on Texas decisions.

Texas statute is invalid as applied in this case, as jurors were misinstructed. They were told their role was

3/24/80

79-5175 Adams v Texas (Jim's views that are persuasive)

Two Q:

1. ~~Is~~ Does Witherspoon apply to Ga statute: Gregg?

Under Ga. statute, jury never has to impose C/P. Thus, jury has substantial discretion. Witherspoon applies.

2. Is Texas significantly different from Ga.?

~~Is~~ Must look to Jurek opinion. ~~We~~ We had to decide whether Texas statute was more like Ga. than N.C., as invalidated in Woodson. If

In Jurek, we said if statute would allow consideration only of aggravating factors, it would be invalid.

Language in Jurek that a Ct could consider mitigating factors is not based on language of statute. We were justified by ? in allowing this, relying on Texas decisions.

Texas statute is invalid ~~?~~ as applied in this case, as jurors were misinstructed. They were told ~~they~~ their role was limited to answering the three questions — leaving them no discretion as to C/P

Argued 3/24/80

.9-5175 ADAMS v. TEXAS

(Witherspoon issue)

Bruder (Petr)

Does not argue that jury selection in this case affected the guilt or innocence of Δ.

If we reverse, there will be a new trial under Tex. law unless Gov. commutes sentence to life.

Becker (Asst A.G. of Texas)

As a Const. matter, the validity of conviction would not be affected by a reversal. But under Texas law, there would be a retrial of merits.

P.S. emphasized that Witherspoon held that jurors cannot be excluded because of opposition to C/P.

Argues that 12.31(b) changes Witherspoon. No longer makes any difference - pro or con - as to attitude of jurors to C/P.

Becker (cont.) (Despite miserable brief, made a fine lawyer-like argument)

Texas Ct has not said what term "affect" means in § 12.31

Jurors in favor of C/P also were ~~[illegible]~~ excluded — & are ~~excluded~~ excludable under § 12.31

that applies to any juror who says he can't "swear" to answer the ~~[illegible]~~ three questions regardless of views either pro or con C/P.

12.31(b) is fairer to a D than Witherspoon. (Emphasized this)

38 States have C/P. No other state has a counterparty ~~of~~ of 12.31. But all state statutes could be affected by invalidated of Tex statute.

Bruder (Reply)

Doesn't agree that 12.31 is fairer than Witherspoon.

79-5175 Adams v Texas 3/25/80

In Jurek, relying on two decisions of Tex Ct Cr/Appe, we sustained Tex statute because we understood it had been construed to allow jury consideration - at the sentencing stage - to consider both aggravating & mitigating circumstances

The 3 questions put to jury at sentencing stage, do not - on their face - allow jury this discretion.

In Gregg - we distinguished Woodson - because a jury could decline to give death as a matter of discretion

See & read Jurek p 262

The Texas Court of Criminal Appeals has thus far affirmed only two judgments imposing death sentences under its post-*Furman* law—in this case and in *Smith* v. *State*, No. 49,809 (Feb. 18, 1976) (rehearing pending; initially reported in advance sheet for 534 S. W. 2d but subsequently withdrawn from bound volume). In the present case the state appellate court noted that its law "limits the circumstances under which the State may seek the death penalty to a small group of narrowly defined and particularly brutal offenses. This insures that the death penalty will only be imposed for the most serious crimes [and] . . . that [it] will only be imposed for the same type of offenses which occur under the same types of circumstances." 522 S. W. 2d, at 939.

While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose. See *McGautha* v. *California*, 402 U. S. 183, 206 n. 16 (1971); Model Penal Code § 201.6, Comment 3, pp. 71–72 (Tent. Draft No. 9, 1959). In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances. For example, the Texas statute requires the jury at the guilt-determining stage to consider whether the crime was committed in the course of a particular felony, whether it was committed for hire, or whether the defendant was an inmate of a penal institution at the time of its commission. Cf. *Gregg* v. *Georgia*, *ante*, at 165–166, n. 9; *Proffitt* v. *Florida*, *ante*, at 248–249, n. 6. Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed.

So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option—even potentially—for a smaller class of murders in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime.

But a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held in *Woodson* v. *North Carolina*, *post*, at 303–305, to be required by the Eighth and Fourteenth Amendments. For such a system would approach the mandatory laws that we today hold unconstitutional in *Woodson* and *Roberts* v. *Louisiana*, *post*, p. 325.[6] A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.

Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances. In *Gregg* v. *Georgia*, we today hold constitutionally valid a capital-sentencing system

[6] When the drafters of the Model Penal Code considered a proposal that would have simply listed aggravating factors as sufficient reasons for imposition of the death penalty, they found the proposal unsatisfactory:

"Such an approach has the disadvantage, however, of according disproportionate significance to the enumeration of aggravating circumstances when what is rationally necessary is . . . the balancing of any aggravations against any mitigations that appear. The object sought is better attained, in our view, by requiring a finding that an aggravating circumstance has been established *and* a finding that there are no substantial mitigating circumstances." Model Penal Code § 201.6, Comment 3, p. 72 (Tent. Draft No. 9, 1959) (emphasis in original).

Vacate 8–1

79-5175 Adams v. Texas Conf. 3/26/80

The Chief Justice Awaited discussion before voting. Vacate.
Only Q is whether Witherspoon is applicable.
Texas statute is badly drafted. Q as to meaning of "affect".
If we treat this as statute as applied, answer may be different from facial consideration.
Witherspoon not a "one way street". The jurors excluded ~~were not to be capable~~ indicated they could not fairly determine the sentence.

Mr. Justice Brennan Vacate for usual reasons.
Also reverse on Witherspoon

Only issue is validity of sentence.
Would vacate it.

Mr. Justice Stewart Vacate death sentence.
~~I~~ Had originally thought that bifurcated procedure, where jurors are given guidance + ~~di~~ some discretion, made Witherspoon irrelevant.
Lockett emphasized the necessity of jury being allowed ~~to~~ discretion to consider all factors.
Texas statute is different. On its face, jurors have no discretion. If all three Qs are answered affirmatively, C/P automatically follows. Our Jurek op read statute to comport with Gregg. But now conclude Witherspoon does apply. — These jurors - some of them - should have been

If these Qs were simply factual, & C/P was then mandatory, Woodson would invalidate

Mr. Justice White Vacate sentence

As long as Witherspoon is on books (doesn't like it) some of these jurors should not have been excluded. Could join 5 to modify Witherspoon.

Mr. Justice Marshall Vacate

no discussion

Mr. Justice Blackmun Vacate

Haven't agreed with many of capital cases. Texas agrees that Witherspoon applies. 9th argument is inconsistent.

§ 31(b) would exclude jurors who would be OK under Witherspoon

Mr. Justice Powell *Vacate*

See my yellow notes.

(?) If I write I see need to counsel as to exactly how we decide this. Do we merely say that certain ~~jurors~~ prospective jurors should have been seated? Do we spell out how a court should instruct on the three questions.

Mr. Justice Rehnquist *Affirm*

Our cases since Woodson/Gregg have been down hill. We are back to Furman - in effect.

Mr. Justice Stevens *Vacate*

A juror can be asked whether, notwithstanding his opposition to C/P, he can follow court's instructions.

But would invalidate statute. It is facially invalid. Texas should start with new statute.

In any event, it is being applied contrary to Witherspoon.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-5175

Randall Dale Adams, Petitioner, v. State of Texas. | On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[May —, 1980]

MR. JUSTICE WHITE delivered the opinion of the Court.

This capital case presents the question whether Texas contravened the Sixth and Fourteenth Amendments as construed and applied in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), when it excluded members of the venire from jury service because they were unable to take an oath that the mandatory penalty of death or imprisonment for life would not "affect their deliberations on any issue of fact." We hold that these were exclusions that were inconsistent with *Witherspoon*, and we therefore reverse the sentence of death imposed on the petitioner.

I

Trials for capital offenses in Texas are conducted in a two-phase proceeding. See Tex. Code Crim. Proc., Art. 37.071 (Supp. 1980). In the first phase, the jury considers the question of the defendant's guilt or innocence. If the jury finds the defendant guilty of a capital offense, the trial court holds a separate sentencing proceeding at which a wide range of additional evidence in mitigation or aggravation is admissible. The jury is then required to answer the following questions based on evidence adduced during either phase of the trial:

"(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 deceased." Art. 37.071 (b).

If the jury finds beyond a reasonable doubt that the answer to each of these questions is yes, the court is required to impose a sentence of death. If the jury finds that the answer to any of the three questions is no, the court imposes a sentence of life imprisonment. Art. 37.071 (c), (e).

The petitioner in this case was charged with the capital offense of murdering a peace officer.[1] During the *voir dire* examination of individual prospective jurors, the prosecutor, and sometimes the trial judge, intensively inquired as to whether their attitudes about the death penalty permitted them to take

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[1] Under Tex. Penal Code Ann. § 19.03 (a)(1) (Supp. 1980), whoever "murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman" is guilty of a capital offense. Texas has authorized the death penalty for four other offenses: murder committed in the course of kidnaping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder of a prison employee by a prison inmate. § 19.03.

Under the current Texas capital sentencing scheme [illegible] § 19.03 [illegible] Tex. Code Crim. Proc. § 37.071 (Supp. 1980) [illegible] *Furman v. Georgia*, 408 U. S. 238 (1972) [illegible] The Court [illegible] Texas [illegible] *Jurek v. Texas*, 428 U. S. 262 (1976).

the oath set forth in Tex. Penal Code Ann. § 12.31 (b) (Supp. 1980). Section 12.31 (b) 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."

Typically, the prospective juror was first advised that the State was seeking the death penalty and asked to state his general views on the subject, which were sometimes explored in considerable depth. He was then informed in detail of the special procedure used by Texas in capital cases, including in particular the fact that yes answers to the three punishment questions would automatically result in the trial judge's imposing the death sentence. Finally, he was asked whether he could state under oath, as required by § 12.31 (b), that the mandatory penalty of death or imprisonment for life would not affect his deliberations on any issue of fact. On the State's submission and over petitioner's objections, the trial judge excused a number of prospective jurors who were unwilling or unable to take the § 12.31 (b) oath.

The jury selected under this procedure convicted the petitioner of the charged offense and answered the statutory questions affirmatively at the punishment phase, thus causing the trial judge to impose the death sentence as required by § 37.071 (e). On appeal, the petitioner argued that prospective jurors had been excluded in violation of this Court's decision in *Witherspoon* v. *Illinois*, *supra*. The Texas Court of Criminal Appeals rejected the contention on the authority of its previous cases which had "consistently held that the statutory scheme for the selection of jurors in capital cases in Texas and in particular the application of § 12.31 (b) to the punishment issues comports with the constitutional requirements of *Witherspoon*." 577 S. W. 2d 717, 728 (1979) (citations

omitted). We granted the petition for a writ of certiorari, — U. S. — (1980), limited to the following questions:

> "(1) Is the doctrine of *Witherspoon* v. *Illinois*, 391 U. S. 510, applicable to the bifurcated procedure employed by Texas in capital cases?
>
> "(2) If so, did the exclusion from jury service in the present case of prospective jurors pursuant to Texas Penal Code § 12.31 (b) violate the doctrine of *Witherspoon* v. *Illinois, supra*?" [2]

II

A

Witherspoon involved a state procedure for selecting juries in capital cases, where the jury did the sentencing and had complete discretion as to whether the death penalty should be imposed. In this context, the Court held that a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during *voir dire* examination that they had conscientious scruples against or were otherwise opposed to capital punishment. The State was held to have no valid interest in such a broad-based rule of exclusion, since "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him . . . and can thus obey the oath he takes as a juror." *Witherspoon* v. *Illinois, supra*, at 519. The defendant, on the other hand, was seriously prejudiced by the State's practice. The jury which sentenced him to death fell "woefully short of that impartiality to which the petitioner was entitled" on the issue of punishment. *Id.*, at 518. By excluding all those who opposed capital punishment, the

[2] In *Burns* v. *Estelle*, 592 F. 2d 1297 (1979), a panel of the Court of Appeals for the Fifth Circuit found that the application of Tex. Penal Code Ann. § 12.31 (b) (Supp. 1980) [illegible] *Witherspoon*. The [illegible] Fifth Circuit [illegible] the panel's judgment and set the case for [illegible]. The court heard argument on January 8, 1980, but has not yet rendered a decision.

State "crossed the line of neutrality" and "produced a jury uncommonly willing to condemn a man to die." *Id.*, at 520, 521.

The Court recognized that the State might well have power to exclude jurors on grounds more narrowly drawn:

> "[N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." *Id.*, at 522-523, n. 21 (emphasis in original).

This statement seems clearly designed to accommodate the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths. For example, a juror would no doubt violate his oath if he was not impartial on the question of guilt. Similarly, the Illinois law in effect at the time *Witherspoon* was decided required the jury at least to *consider* the death penalty, although it accorded the jury absolute discretion as to whether or not to impose it. A juror wholly unable even to consider imposing the death penalty, no matter what the facts of a given case, would clearly be unable to follow the law of Illinois in assessing punishment.

In *Boulden* v. *Holman*, 394 U. S. 478, 483-484 (1969) (*per curiam*), we again emphasized the State's legitimate interest in obtaining jurors able to follow the law:

> "[I]t is entirely possible that a person who has a "fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the in-

structions of a trial judge and to consider fairly the imposition of the death sentence in a particular case."

And in *Lockett* v. *Ohio*, 438 U. S. 586, 595-596 (1978), we upheld against a *Witherspoon* challenge the exclusion of several jurors who were unable to respond affirmatively to the following question:

> "do you feel that you could take an oath to well and truely [sic] try this case . . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?"

This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

B

We have little difficulty in concluding that the same rule applies to the bifurcated procedure employed by Texas in capital cases.[6] This procedure differs from the Illinois statute in effect at the time *Witherspoon* was decided in three principal ways: (1) the *Witherspoon* jury assessed punishment at the same time as it rendered its verdict, whereas in Texas the jury considers punishment in a subsequent penalty proceeding; (2) the *Witherspoon* jury was given unfettered discretion to impose the death sentence or not, whereas the

[6] In *Davis* v. *Georgia*, 429 U. S. 122 (1976), the Court applied the *Witherspoon* doctrine to a case arising under a death penalty scheme similar in some respects to the current Texas system. Petitioner and amicus suggest that *Davis* conclusively establishes the applicability of *Witherspoon* to the present case. We do not treat the question as foreclosed, however, because the issue was not explicitly raised in that case.

discretion of a Texas jury is circumscribed by the requirement that it impartially answer the statutory questions; and (3) the *Witherspoon* jury directly imposed the death sentence, whereas Texas juries merely give answers to the statutory questions, which in turn determine the sentence pronounced by the trial judge. Because of these differences, the jury plays a somewhat more limited role in Texas than it did in Illinois. If the juror is to obey his oath and follow the law of Texas, he must be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the statutory questions without conscious distortion or bias. The State does not violate the *Witherspoon* doctrine when it excludes prospective jurors who are unable or unwilling to address the penalty questions with this degree of impartiality.

Nevertheless, jurors in Texas must determine whether the evidence presented by the State convinces them beyond reasonable doubt that each of the three questions put to them must be answered in the affirmative. In doing so they must consider both aggravating and mitigating circumstances, whether appearing in the evidence presented at the trial on guilt or innocence or during the sentencing proceedings. Jurors will characteristically know that affirmative answers to the questions will result in the automatic imposition of the death penalty, *Hovila v. State*, 532 S. W. 2d 293, 294 (1975), and each of the jurors whose exclusion is challenged by petitioner was so informed. In essence, Texas juries must be allowed to consider "on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek v. Texas*, *supra*, at 271 (opinion of STEWART, POWELL, and STEVENS, JJ.). This process is not an exact science, and the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths.

With these considerations in mind, it is apparent that a Texas juror's views about the death penalty might influence

the manner in which he performs his role but without exceeding the "guided jury discretion," 577 S. W. 2d 717, 720 (1979), permitted him under Texas law. In such circumstances he could not be excluded consistently with *Witherspoon*. Exclusions under § 12.31 (b), like other exclusions, must be examined in this light.[5]

C

The State urges that *Witherspoon* and § 12.31 (b) may coexist as separate and independent bases for excluding jurors in Texas and that exclusion under the statute is consistent with the Sixth and Fourteenth Amendments as construed in *Witherspoon*. Brief for Respondent 48. It is the State's position that even if some jurors in the present case were excluded on grounds broader than that permitted under *Witherspoon*, the exclusion was nevertheless proper under § 12.31 (b). The State's argument is consistent with the holdings of decisions in the Texas Court of Criminal Appeals which have considered the relationship between *Witherspoon* and § 12.31 (b).[6] The argument, such as it is, is unpersuasive.

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[5] Even the State concedes that *Witherspoon* "applies" to the Texas system. Brief for Respondent 46. The State suggests that this proposition is "questionable as a matter of logic" but agrees that "Texas experience and case law conclusively demonstrate *Witherspoon's* applicability." The Texas Court of Criminal Appeals has consistently held that *Witherspoon* is "applicable" in that State. *E. g., Woodkins* v. *State*, 542 S. W. 2d 855, 862 (1976), cert. denied, 431 U. S. 960 (1977); *Burns* v. *State*, 556 S. W. 2d 270, 275, cert. denied, 434 U. S. 935 (1977); *[illegible]* v. *State*, [illegible] S. W. 2d [illegible], 342, cert. denied, [illegible] U. S. 1002 (1977); *Whitmore* v. *State*, 570 S. W. 2d 889, 893 (1976).

[6] *E. g., Moore* v. *State*, 542 S. W. 2d 664, 672 (1976), cert. denied, 431 U. S. 949 (1977); *Woodkins* v. *State*, *supra*, at 862; *Shippy* v. *State*, 556 S. W. 2d 246, 251, cert. denied, 434 U. S. 935 (1977); *Burns* v. *State*, *supra*, at 275-276; *Freeman* v. *State*, 556 S. W. 2d 287, 297-298 (1977), cert. denied, 434 U. S. 1088 (1978); *[illegible]* v. *State*, *supra*, at [illegible]; *Hughes* v. *State*, 562 S. W. 2d 857, 859-861, cert. denied, 439 U. S. 903 (1978); *Hovila* v. *State*, 562 S. W. 2d 243, 248 (1978), cert. denied, 440 U. S. 926 (1979); *Bodde* v. *State*, 568 S. W. 2d 344, 348-349, cert. denied, 440 U. S. 968 (1979); *Whitmore* v. *State*, *supra*, at 893; *[illegible]* v. *State*, 581 S. W. 2d

As an initial matter, it is clear beyond peradventure that *Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on "any broader basis" than inability to follow the law or abide by their oaths, the death sentence cannot be carried out. *Witherspoon* v. *Illinois*, *supra*, at 522, n. 21. While this point may seem too obvious to bear repetition, it is apparent from their frequent references to *Witherspoon* as a ground for "disqualifying" prospective jurors that the State, and the Texas Court of Criminal Appeals, might have fallen into the error of assuming that *Witherspoon* and § 12.31 (b) are both grounds for exclusion, so that there is no conflict if § 12.31 (b) excludes prospective jurors that *Witherspoon* does not.

Nor do we agree with the State's argument that because it has a different origin and purpose § 12.31 (b) cannot and will not lead to exclusions forbidden by *Witherspoon*. Unlike grounds for exclusion having nothing to do with capital punishment, such as personal bias, ill-health, financial hardship, or peremptory challenges, § 12.31 (b) focuses the inquiry directly on the prospective juror's beliefs about the death penalty, and hence clearly falls within the scope of the *Witherspoon* doctrine. The State could, consistently with *Witherspoon*, use § 12.31 (b) to exclude prospective jurors whose views on capital punishment are such as to make them unable to follow the law or obey their oaths. But the use of § 12.31 (b) to exclude jurors on broader grounds based on their opinions concerning the death penalty is impermissible.

[illegible] 174, 177 (1979); pet. for cert. filed, No. 79-5164; *Burks* v. *State*, 583 S. W. 2d 389, 393-394 (1979), pet. for cert. filed, No. 79-5533.

E. g., *Brief for Respondent* 33, 42-43; *Moore* v. *State*, *supra*, at 572; *Freeman* v. *State*, *supra*, at 298; *Burns* v. *State*, *supra*, at 313; *Hughes* v. *State*, *supra*, at 809; *Hughes* v. *State*, *supra*, at 280; *Chambers* v. *State*, 568 S. W. 2d 313, 320 (1978), cert. denied, 440 U. S. 928 (1979); *[illegible]* v. *State*, *supra*, at 538; *Garcia* v. *State*, *supra*, at 177.

Finally, we cannot agree that § 12.31 (b) is "neutral" with respect to the death penalty since under that section the defendant may challenge jurors who state that their views in favor of the death penalty will affect their deliberations on fact issues. Despite the hypothetical existence of the juror who believes literally in the Biblical admonition "an eye for an eye," see *Witherspoon* v. *Illinois, supra,* at 536 (Black, J., dissenting), it is undeniable, and the State does not seriously dispute, that such jurors will be few indeed as compared with those excluded because of scruples against capital punishment. The appearance of neutrality created by the theoretical availability of § 12.31 (b) as a defense challenge is not sufficiently substantial to take the statute out of the ambit of *Witherspoon.*

III

Based on our own examination of the record, we have concluded that § 12.31 (b) was applied in this case to exclude prospective jurors on grounds impermissible under *Witherspoon* and related cases. As employed here, the touchstone of the inquiry under § 12.31 (b) was not whether putative jurors could and would follow their instructions and answer the posited questions in the affirmative if they honestly believed the evidence warranted it beyond reasonable doubt. Rather, the touchstone was whether the fact that the imposition of the death penalty would follow automatically from affirmative answers to the questions would have any effect at all on the jurors' performance of their duties. Such a test could, and did, exclude jurors who stated that they would be "affected" by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally. Others were excluded only because they were unable

[illegible] Prospective jurors Mahon, Jenson, and Ferguson fell into this category. Mr. Ferguson, for example, stated at one point during his voir dire examination:

"Well, I think it probably would [affect my deliberations] because I'd

positively to state whether or not their deliberations would in any way be "affected."[1] But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments. Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

We repeat that the State may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths. But in the present case Texas has applied § 12.31 (b) to exclude jurors whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected. It does not appear in the record before us that these individuals were so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme.

[illegible] you're taking a man's life here. You definitely don't want to take it lightly." Tr. of Voir Dire 367.

[2] Prospective jurors Coyle, White, McDonald, and Riddle were excluded on this ground.

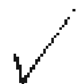
Accordingly, the Constitution disentitles the State to execute a sentence of death imposed by a jury from which such prospective jurors have been excluded.

The judgment of the Texas Court of Criminal Appeals is consequently reversed to the extent that it sustains the imposition of the death penalty.

So ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST



May 20, 1980

Re: No. 79-5175 Adams v. Texas

Dear Byron:

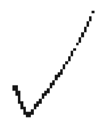
I shall in due course circulate what will be, as I recall the Conference voting, a rather lonely dissent.

Sincerely,

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543



May 20, 1980

Re: No. 79-5175 - Adams v. Texas

Dear Byron:

Please join me.

Respectfully,

Mr. Justice White

Copies to the Conference

May 22, 1980

79-5175 Adams v. Texas

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference

[illegible] of the United States

[illegible]

[illegible]

Re: [illegible]

[illegible]

[illegible]

Sincerely,

[illegible]

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 16, 1980

RE: No. 79-5175 Adams v. Texas

Dear Byron:

I agree.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 18, 1980

RE: 79-5175 - Adams v. Texas

Dear Byron:

Please show me as concurring in the judgment. This case suggests the real need to re-examine the "one-way" strictures of Witherspoon. I refrain from writing but if I did, it would be to develop this theme. I thus observe stare decisis as do you, but not quite as fully as you.

Regards,

Mr. Justice White

Copies to the Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
			3/31/80					
Concur in judgment 6/18/80	Join BRW 6/16/80	Join BRW 5/22/80	1st Draft 5/19/80 2nd draft 6/5/80 3rd draft 6-18-80	Typed draft Con in judgment 6/17/80 1st draft 6/18/80	Join BRW 5/26/80	Join BRW 5/22/80	Will dissent 5/20/80 1st draft 6/10/80	Join BRW 5/20/80
	Con opinion 1st draft 6/19/80						2nd draft 6/20/80	

79-5175 Adams v. Texas