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FACTS

Daniel Greene was convicted of murder, armed robbery, and aggravated assault and sentenced to death. Over the defendant's objections at trial, the court excused for cause five jurors who expressed reservations about the death penalty.[1] The Supreme Court of Georgia affirmed Greene's death sentence, and cited *Wainwright v. Witt*[2] as "'controlling authority' for a rule that appellate courts must defer to trial courts' findings concerning juror bias."[3] Greene petitioned for certiorari, arguing that a state appellate court is not bound by the *Witt* standard of review when evaluating the dismissal of jurors for cause.[4]

HOLDING

The United States Supreme Court granted certiorari, holding that (1) *Witt* governed the determination of when a juror may be excused for cause because of his views on the death penalty,[5] but that (2) the *Witt* standard of review, whereby federal habeas courts must accord a presumption of correctness to state courts' findings of juror bias, did **not** govern the standard of review to be applied by **state appellate courts** reviewing trial courts' rulings on jury selection.[6]

ANALYSIS/APPLICATION IN VIRGINIA

In holding that *Witt* was not controlling as to the standard for state appellate review of trial courts' rulings on jury selection, the Court further stated that "[t]he Supreme Court of Georgia is free to adopt the rule laid down in *Witt* . . . but it need not do so."[7]

It is difficult to ascertain whether the Supreme Court of Virginia sees itself bound by the presumption of correctness accorded by *Witt* with regard to trial court decisions on jury selection, or whether it has even chosen to adopt the *Witt* standard of review. For example, in a pre-*Witt* decision, *LeVasseur v. Commonwealth*,[8] the Supreme Court of Virginia stated, "The trial judge must satisfy himself that the juror's commitment against the death penalty is 'unmistakably clear.' This finding of fact cannot be disturbed on appeal **unless we can say**, upon consideration of the voir dire as a whole, **that it was erroneous.**"[9]

However, in post-*Witt* decisions, the Supreme Court of Virginia has stated that "[a]s an appellate court, we **must** give deference to the trial court's decision whether to retain or exclude individual veniremen because the trial court 'sees and hears the juror.'"[10] This rule quotes a portion of *Witt's* language. The court has also cited *Witt* for the proposition that "[d]eference must be paid to trial judges in deciding which juror will be unable to apply the law faithfully and impartially."[11] However, the court has also consistently stated that the trial court's findings as to juror bias "will not be disturbed on appeal unless **manifest error** exists."[12] If Virginia appellate courts must give deference to trial court findings on juror bias, the Supreme Court of Virginia has not stated whether that decision was an independent one, or whether it believes *Witt* requires such deference.

Because a clear cut position on the applicability of *Witt* is lacking, appellate defense counsel in Virginia may use *Greene* to argue that, with regard to trial court rulings on juror bias, the Virginia state courts are **not** bound by the standard of review as announced in *Witt*. State appellate courts need not defer to trial court rulings on juror bias; rather, they may review the record as a whole and make an independent determination as to juror bias.

Summary and analysis by:
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[1] *Greene v. Georgia*, 117 S. Ct. 578 (1996).

[2] 469 U.S. 412 (1985).

[3] *Greene*, 117 S. Ct. at 578.

[4] *Id.*

[5] *Id.* at 578-79. The *Witt* standard for determining whether a juror may be removed for cause because of his views on the death penalty is whether those views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. at 424 (citation omitted).

[6] *Greene*, 117 S. Ct. at 579.

[7] *Id.* at 579. Note that *Witt* arose on federal habeas, where deference to state court findings is mandated by 28 U.S.C. § 2254(d).

[8] 225 Va. 564, 304 S.E.2d 644 (1983).

[9] *LeVasseur*, 225 Va. at 584, 304 S.E.2d at 655 (emphasis added). *See also Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978).

[10] *Eaton v. Commonwealth*, 240 Va. 236, 246, 397 S.E.2d 385, 391 (1990) (emphasis added). *See also Spencer v. Commonwealth*, 238 Va. 563, 572, 385 S.E.2d 850, 855 (1989); *Sheppard v. Commonwealth*, 250 Va. 379, 386, 464 S.E.2d 131, 136 (1995).

[11] *Bennett v. Commonwealth*, 236 Va. 448, 469, 374 S.E.2d 303, 316 (1988).

[12] *Gray v. Commonwealth*, 233 Va. 313, 339, 356 S.E.2d 157, 171 (1987) (emphasis added). *See also O'Dell v. Commonwealth*, 234 Va. 672, 693, 364 S.E.2d 491, 503 (1988); *Eaton*, 240 Va. at 246, 397 S.E.2d at 391; *Bennett*, 236 Va. at 469, 374 S.E.2d at 316; and *Sheppard*, 250 Va. at 386, 464 S.E.2d at 136.