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Qualifying Jurors in Capital Trials: Are Sixth Amendment Rights Adequately Protected in North Carolina?

The North Carolina judicial system heartily embraces the practice of death qualification in capital trials.[1] A jury is deemed death-qualified when it is purged of all resolute opposition to capital punishment. In North Carolina, as in all states with capital crimes, the prosecutor may challenge for cause all prospective jurors who express unequivocally that they would never impose the death penalty.[2] The rationale for allowing death qualification of a jury is twofold. First, the prosecution wants to eliminate all jurors who would refuse to find a defendant guilty of a capital offense, regardless of the evidence, because of the threat of capital punishment.[3] Second, the prosecution desires a jury willing to impose the death penalty in statutorily defined situations.[4] Constitutional objections to death qualification, grounded in the sixth amendment, are based on defendants' claims that a death-qualified jury is conviction-prone[5] and that a death-qualified jury does not represent a fair cross-section of the community.[6] In *Witherspoon v. Illinois*[7] the United States Supreme Court attempted to balance the state's interest in securing a jury capable of following the law with the criminal defendant's constitutionally guaranteed right to an impartial jury composed of a fair cross-section of the community.[8] The Supreme Court held that a death qualification exclusion was acceptable only when it was unequivocally clear that the excluded prospective juror automatically would vote against the death penalty regardless of the evidence, and that the attitude of that prospective juror toward capital punishment would make it impossible for him to follow impartially the law in determining a defendant's guilt.[9] Exclusion for less would result in a reversal of the death sentence.[10]

Although the conclusion of the Supreme Court is clear, several issues remain unsettled and attacks on death qualification continue. First, the

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1. *See, e.g.*, State v. Bare, 309 N.C. 122, 305 S.E.2d 513 (1983); State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983); State v. Hill, 308 N.C. 382, 302 S.E.2d 202 (1983); State v. Ladd, 308 N.C. 272, 302 S.E.2d 164 (1983); State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983); State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 103 S. Ct. 474 (1982); State v. Oliver, 302 N.C. 28, 272 S.E.2d 183 (1981); State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980).

2. *See* Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968); White, *Death-Qualified Juries: The "Prosecution-Proneness" Argument Reexamined*, 41 U. PITT. L. REV. 353, 354-55 (1980).

3. White *supra* note 2, at 354.

4. *Id.* at 355.

5. *Id.* at 356.

6. *See* Colussi, *The Unconstitutionality of Death Qualifying a Jury Prior to the Determination of Guilt: The Fair-Cross-Section Requirement in Capital Cases*, 15 CREIGHTON L. REV. 595, 596 (1982).

7. 391 U.S. 510 (1968).

8. *Id.* at 518-21.

9. *Id.* at 522 n.21.

10. *Id.* In *Witherspoon* the Court limited its reversal to defendant's death sentence. "Nor does the decision in this case affect the validity of any sentence *other* than one of death. Nor, finally, does today's holding render invalid the *conviction*, as opposed to the *sentence*, in this or any other case." *Id.* at 523 n.21.

Supreme Court never has defined specifically the situation in which a *Witherspoon* violation warrants reversal of the death penalty.[11] Second, it is not clear when a prospective juror has expressed an unequivocal inability to follow and apply the law.[12] Finally, the Court left unanswered the question whether the sixth amendment rights of a defendant are protected adequately by the death qualification procedure as limited by *Witherspoon*.[13]

North Carolina consistently has resolved all of these issues against the capital defendant.[14] In 1983 the North Carolina Supreme Court perfunctorily dismissed the allegations of five defendants attacking the death qualification procedure.[15] This note analyzes the practice of death qualification in North Carolina by examining the background of Supreme Court death qualification treatment, the application of death qualification in North Carolina capital trials, the North Carolina Supreme Court's treatment of attacks on the state's death qualification practice, and the available alternatives to the present death qualification system. The note concludes that death qualification as presently practiced in North Carolina unnecessarily violates a capital defendant's guaranteed right to a fair trial under the sixth amendment.

The practice of death qualification began at a time when conviction for a capital offense resulted in an automatic death sentence.[16] Consequently, a juror opposed to the death penalty might refuse to find a defendant guilty to avoid imposition of capital punishment. To promote the impanelling of juries capable of finding a capital defendant guilty, prosecutors were permitted to exclude from capital cases jurors who had serious objections to the death penalty.[17] Because the death penalty is no longer mandatory,[18] however, the necessity of impanelling a death-qualified jury is not readily apparent. Furthermore, all states that have retained capital punishment provide for a bifurcated proceeding in which the guilt and sentencing phases are separate.[19]

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11. Subsequent Supreme Court decisions, however, have tended to clarify the *Witherspoon* holding. *See infra* notes 31-38 and accompanying text.

12. North Carolina examines death qualification "contextually." *See infra* notes 44-46 and accompanying text. The United States Supreme Court has not specified whether the unequivocal refusal to apply the death penalty must be ascertainable from the record. A juror's response of "I think so" to the question of whether he would refuse to impose the death penalty, however, was held less than unequivocal. Maxwell v. Bishop, 398 U.S. 262, 264-66 (1970). The Supreme Court has also held that a conviction by a guilt-phase jury chosen in violation of *Witherspoon* cannot stand simply because the totality of the record evidences no violation of the spirit of *Witherspoon*. *See* Mathis v. New Jersey, 403 U.S. 946 (1971) (mem.), *rev'g* 52 N.J. 238, 245 A.2d 20 (1968). Nor does the fact that a trial judge has the opportunity to observe and listen to a juror prevent reversal when the juror's responses on record are equivocal. *See* Aiken v. Washington, 403 U.S. 946 (1971) (mem.), *rev'g* 75 Wash. 2d 421, 452 P.2d 232 (1971).

13. *Witherspoon*, 391 U.S. at 520 n.18.

14. *See infra* notes 39-48, 108-10, and accompanying text.

15. *See* State v. Bare, 309 N.C. 122, 305 S.E.2d 513 (1983); State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983); State v. Hill, 308 N.C. 382, 302 S.E.2d 202 (1983); State v. Ladd, 308 N.C. 272, 302 S.E.2d 164 (1983); State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983).

16. *See* White, *supra* note 2, at 354-56.

17. *Id.* at 354-55.

18. *See, e.g.*, N.C. GEN. STAT. § 15A-2000(b) (1983).

19. *See* White, *supra* note 2, at 353 n.2. *See also* N.C. GEN. STAT. § 15A-2000 (1983). The bifurcated system has been in response to the United States Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972). The Supreme Court has approved the bifurcated system. *See,*

Although the concern that jurors, to avoid the death penalty, would not convict a defendant arguably diminishes in the wake of discretionary capital punishment and bifurcated capital trials, the majority of jurisdictions still allow prosecutors to excuse for cause jurors opposed to the death penalty.[20]

Counterbalancing the prosecution's desire to impanel a jury willing to convict and impose the death penalty is the sixth amendment guarantee of the criminal defendant's right to a fair trial.[21] This right guarantees the defendant a trial before an impartial jury.[22] Any verdict rendered by a less than impartial jury cannot stand, regardless of whether actual prejudice to the defendant is shown.[23] To meet the requirement of an impartial jury, the United States Supreme Court has held that a jury must be chosen from a venire representing a fair cross-section of the community.[24] Although the sixth amendment does not guarantee that each jury must have a representative from each class in the community, absent a justifiable state interest, systematic exclusion of any class from jury service is constitutionally unacceptable.[25] This constitutional right to a fair trial by an impartial jury is extended to state proceedings by the fourteenth amendment.[26] Thus, any sixth amendment issues arising out of the North Carolina death qualification practice must conform to the Supreme Court's interpretation.

In *Witherspoon* the Supreme Court attempted to balance the need to impanel a jury able to properly follow the law with the need to protect sixth amendment guarantees to a fair trial. Prior to this decision, jurors routinely were excluded for cause from capital juries when expressing any opposition to the death penalty.[27] The Court rejected such comprehensive exclusions and limited the sweep of the death qualification procedure, holding that prospective jurors could be excused for cause only when they unequivocally state that they would never impose the death penalty, and when jurors state that their views concerning the death penalty would make it impossible for them to determine guilt impartially.[28] Absent one of these exceptions, a juror cannot be

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e.g., Gregg v. Georgia, 428 U.S. 153 (1976) (validating a Georgia statute providing for bifurcated proceedings in capital cases); Proffitt v. Florida, 428 U.S. 242 (1976) (validating a similar Florida statute).

20. *See* Colussi, *supra* note 6, at 598 n.12. This power to excuse, however, was limited by the Supreme Court in *Witherspoon* and later decisions. *See infra* notes 27-38 and accompanying text.

21. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

22. *See* Sheppard v. Maxwell, 384 U.S. 333, 351 (1966).

23. *See, e.g.*, Peters v. Kiff, 407 U.S. 493, 502 (1972).

24. *See* Williams v. Florida, 399 U.S. 78, 100 (1970) (criminal trial jury should consist of laymen representative of cross-section of the community).

25. The Court reached this conclusion in Taylor v. Louisiana, 419 U.S. 522, 534-35 (1975). The requirements for establishing a systematic exclusion were established in Duren v. Mississippi, 439 U.S. 357, 364 (1979). *See also infra* notes 93-100 and accompanying text.

26. Duncan v. Louisiana, 391 U.S. 145, 148-50 (1968).

27. *See, e.g.*, Spence v. State, 274 N.C. 536, 164 S.E.2d 593 (1968) (79 of 150 jurors excused for cause due to belief that death penalty was wrong). *See also* Colussi, *supra* note 6, at 598 n.12 (outlining history of practice of excluding jurors because of opposition to death penalty).

28. *Witherspoon*, 391 U.S. at 522-23 & n.21.

excluded for cause. If veniremen are excluded on any broader basis, the death penalty cannot be imposed.[29] The *Witherspoon* Court reversed the death penalty sentence imposed by a jury from which prospective jurors had been excused on a broader basis.[30]

Several Supreme Court decisions have clarified the holding in *Witherspoon*. In *Adams v. Texas*[31] the Court held that the fact that a juror's deliberations merely would be "affected" by death penalty attitudes was not sufficient for an excusal. The Court found it natural for a juror to take more seriously a decision concerning a person's life.[32] In *Adams* a death penalty sentence was overturned because jurors were excused for cause on a broader basis than that permitted under *Witherspoon*.[33]

In *Davis v. Georgia*[34] the Court held that a death qualification exclusion was proper only if, prior to trial, a venireman is committed unequivocally to voting against the death penalty regardless of the evidence. The Court held that improper exclusion of even one juror would invalidate any death sentence imposed.[35] Thus, it was not necessary to establish systematic exclusion in violation of *Witherspoon* to warrant a sentence reversal.

The Supreme Court further clarified the *Witherspoon* test in *Boulden v. Holman*,[36] in which it addressed the question of how prospective jurors may be examined during the death qualification *voir dire*. The Court affirmed the assertion in *Witherspoon* that " '[t]he critical question . . . is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood–or misunderstood–by prospective jurors.' "[37] The Court held that the questions asked prospective jurors during death qualification must be phrased so that laymen can understand what is asked and the response can be interpreted properly. This holding reaffirmed the statement in *Witherspoon* that "[u]nless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be

29. *Id.*

30. *Id.* at 521-23. In Lockett v. Ohio, 438 U.S. 586 (1978), the *Witherspoon* criteria were met because prospective jurors who stated that their death penalty views would make it impossible for them to follow the law and the instructions of the trial judge were excluded. *See also* Keeten v. Garrison, 578 F. Supp. 1164, 1170 (W.D.N.C. 1984) (upholding state's right to exclude from both phases of trial jurors whose opposition to death penalty would color their consideration of the evidence).

31. 448 U.S. 38 (1980).

32. *Id.* at 49-50. The Texas statute permitted prospective jurors to be excused for cause when their death penalty attitudes would "affect" their deliberations. TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974). The State argued that the statute and *Witherspoon* offered alternate grounds for excusal. The Supreme Court rejected this suggestion, holding that *Witherspoon* was limiting and therefore excusal on broader statutory grounds was error. *Adams*, 448 U.S. at 48-49.

33. *Adams*, 448 U.S. at 49.

34. 429 U.S. 122 (1976) (per curiam).

35. *Id.* at 123.

36. 394 U.S. 478 (1969).

37. *Id.* at 481-82 (quoting *Witherspoon*, 391 U.S. at 516 n.9).

assumed that that is his position."[38] If a juror cannot understand the questions put forward during *voir dire*, it is impossible to determine if his answers are unambiguous and unequivocal.

In summary, to conform with Supreme Court decisions, death qualification can exclude only those jurors who would vote automatically against the imposition of the death penalty or who are unable impartially to determine guilt because of death penalty attitudes. *Voir dire* questions should be asked in such a way that veniremen understand the questions and the significance of their responses. Finally, the improper exclusion of even one prospective juror is sufficient to mandate reversal of a death sentence. North Carolina practice must be analyzed in light of these limitations.

There is no explicit death qualification statute in North Carolina.[39] The basis for death qualification is implied from a North Carolina statute authorizing challenge for cause of certain jurors.[40] Despite the absence of a specific statutory authorization, the practice of death qualification is accepted throughout North Carolina.

Because there are no definite statutory guidelines, there is little uniformity in death qualification procedures in North Carolina. The basic procedure, however, is similar to that found in other jurisdictions. Death qualification takes place during *voir dire* of the jury with the entire jury panel present.[41] Typically, the prosecutor or trial judge questions prospective jurors concerning their death penalty attitudes. Often, the questions used by the court or prosecutor are unclear and not framed according to *Witherspoon* limitations.[42] If,

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38. *Witherspoon*, 391 U.S. at 516 n.9. *See also* Maxwell v. Bishop, 398 U.S. 262 (1970) (per curiam) (remanding for further consideration of *Witherspoon* issue).

39. Some states have had statutory authorization for death qualification. *See, e.g.*, Adams v. Texas, 448 U.S. 38 (1980) (Texas death-qualification statute invalidated); Witherspoon v. Illinois, 391 U.S. 510 (1968) (Illinois death-qualification statute invalidated).

40. N.C. GEN. STAT. § 15A-1212(b)(9) (1983) provides in pertinent part:

> A challenge for cause to an individual juror may be made by any party on the ground that the juror:
>
> . . . .
>
> (8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.
>
> (9) For any other cause is unable to render a fair and impartial verdict.

41. *See* State v. Jackson, 309 N.C. 26, 34, 305 S.E.2d 703, 710 (1983) (whether to allow sequestration and individual *voir dire* of prospective jurors is a matter for trial court's discretion). Allowing prospective jurors to be present is unwise for two reasons. First, prospective jurors are able to hear and see the *voir dire* of other jurors. This allows them to determine what is necessary for an excusal for cause. Although jury duty is a responsibility shared by all citizens, many avoid it if they can find a way. *See* Brief for Appellant Moore at 33, State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981) (prospective juror expressed unwillingness to impose death penalty when he realized he could be excused for doing so). Second, the process tends to prejudice jurors against the defendant. The constant talk of guilt and capital punishment may convince prospective jurors prior to trial of the defendant's guilt. *See* Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980) (holding that any portion of *voir dire* concerning death qualification must be conducted individually and in sequestration); Haney, The Biasing Effect of the Death Qualification Process (1979 prepublication draft) (study indicating that when *voir dire* is not conducted on an individual basis, out of the hearing of other potential jurors, bias against defendant develops).

42. The North Carolina Supreme Court has recognized this as a problem. *See, e.g.*, State v.

after this preliminary questioning, a juror expresses disfavor of capital punishment, there is further inquiry in accordance with *Witherspoon* and *Adams*.[43]

Prospective jurors often are excused for cause based on such ambiguous responses as "I don't think so" or "I don't believe so," when asked whether they could vote to impose the death penalty.[44] Courts in North Carolina have uniformly found that although the specific answers are equivocal, the context of the responses indicates an unwillingness to impose the death penalty.[45] Even in cases in which a juror has been excluded improperly, the North Carolina Supreme Court has held that there was no reversible error because a systematic exclusion in violation of *Witherspoon* was not evident from the record.[46]

The North Carolina Supreme Court has adopted a very narrow interpretation of *Witherspoon*. The court has never analyzed fully the state's death qualification practice in light of the *Witherspoon* decision, yet insists that the North Carolina practice comports with Supreme Court limitations.[47] Post-*Witherspoon* Supreme Court decisions dealing with death qualification have been ignored by the North Carolina Supreme Court. The North Carolina courts analyze death qualification "contextually," meaning that the trial judge

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Pinch, 306 N.C. 1, 56, 292 S.E.2d 203, 240 (Exum, J., dissenting) (questions asked by trial judge ambiguous—excused juror could not have known meaning), *cert. denied*, 103 S. Ct. 474 (1982); State v. Bernard, 288 N.C. 321, 327, 218 S.E.2d 327, 331 (1975) ("[M]any of the problems growing out of prospective jurors' attitudes toward the death penalty could be avoided if district attorneys would prepare and use in the *voir dire* examination of prospective jurors questions framed according to the clear language of *Witherspoon*.").

43. *See, e.g.*, State v. Pinch, 306 N.C. 1, 53-56, 292 S.E.2d 203, 236-40, *cert. denied*, 103 S. Ct. 474 (1982); State v. Avery, 299 N.C. 126, 135-37, 261 S.E.2d 803, 809-10 (1980).

44. *See, e.g.*, State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983). In *Kirkley* a juror was excused for the following answers:

> Q: If you were satisfied beyond a reasonable doubt of the things the law requires you to be satisfied about then would you recommend, in accordance with the law, recommend [sic] a sentence of death, or do you have such strong feelings about the death penalty that even though you were satisfied beyond a reasonable doubt as to those things, you would not vote for the death penalty?
>
> MRS. MCKEE [prospective juror]: I don't feel like I would.
>
> Q: You feel that even though the state had satisfied you of the three elements of the presence of an aggravating circumstance, that it was sufficiently substantial to call for the imposition of the death penalty, and that any mitigating circumstances were insufficient to outweigh the aggravating circumstances, you still feel that you could not vote for the death penalty, even though you were convinced of those things?
>
> MRS. MCKEE: I don't think I could.
>
> Examination by defense attorney, Mr. Chapman.
>
> Q: Could you tell us what your personal views are on the death penalty?
>
> MRS. MCKEE: I'm not sure I know exactly how I feel about it definitely. Given a certain set of personal circumstances, I might have had one feeling one way and another feeling the other way.

Id. at 206-07, 302 S.E.2d 144, 150. *See also* State v. Pinch, 306 N.C. 1, 53-56, 292 S.E.2d 203, 239-40 (Exum, J., dissenting), *cert. denied*, 103 S. Ct. 474 (1982); State v. Avery, 299 N.C. 126, 136-37, 261 S.E.2d 803, 809 (1980).

45. *See* State v. Kirkley, 308 N.C. 196, 207, 302 S.E.2d 144, 150-51 (1983); State v. Williams, 305 N.C. 656, 664-68, 292 S.E.2d 243, 249-52, *cert. denied*, 103 S. Ct. 474 (1982).

46. *See* State v. Bernard, 288 N.C. 321, 325-27, 218 S.E.2d 327, 330-31 (1975).

47. *Id.* at 325-26, 218 S.E.2d at 330-31. *See also* State v. Kirkley, 308 N.C. 196, 205-06, 302 S.E.2d 144, 149-50.

must determine from the words and manner of a prospective juror how the juror feels about the death penalty and how those feelings would affect deliberations.[48]

Justice Exum of the North Carolina Supreme Court has written strong dissents in several death qualification cases.[49] In these dissents, he analyzes the *Witherspoon* decision and subsequent Supreme Court decisions affecting the death qualification issue. One such dissent is found in *State v. Pinch*.[50] In *Pinch* defendant was charged with two counts of first degree murder. The jury found defendant guilty of both offenses and recommended imposition of the death penalty. The court accepted the jury's recommendation and sentenced defendant to death.[51] Prior to the guilt determination phase of the *Pinch* trial, however, the trial court had excused eight veniremen for cause because of their opposition to the death penalty. Defendant argued that he was deprived of the "constitutional rights of due process and trial by jury."[52]

The majority opinion in *Pinch* routinely dismissed defendant's contentions. The *Witherspoon* holding was mentioned briefly as the "applicable constitutional standard."[53] The majority found that seven of the eight excused jurors had expressed unequivocally that they could never impose the death penalty and that their excusal was proper in light of *Witherspoon*.[54] Although the statements of the eighth juror concerning the death penalty were equivocal, the majority concluded that "[c]onsidering her answers contextually, we find that [the putative juror] expressed a sufficient refusal to follow the law."[55]

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48. *See supra* text accompanying note 45.

49. *See, e.g.*, State v. Pinch, 306 N.C. 1, 38-61, 292 S.E.2d 203, 230-43 (Exum, J., dissenting), *cert. denied*, 103 S. Ct. 474 (1982); State v. Avery, 299 N.C. 126, 139-50, 261 S.E.2d 803, 811-18 (1980) (Exum, J., dissenting).

50. 306 N.C. 1, 38, 49-56, 292 S.E.2d 203, 230, 236-40 (Exum, J., dissenting), *cert. denied*, 103 S. Ct. 474 (1982).

51. *Id.* at 7, 292 S.E.2d at 212.

52. *Id.* at 9, 292 S.E.2d at 213.

53. *Id.*

54. *Id.*

55. *Id.* One excused juror had responded to some of the district attorney's questions as follows:

> Q: I understand this is a tough area, but we have to inquire about this now and everyone is entitled to their own opinion. Are you saying, Ma'am that you could not and you would not vote to impose the death penalty in this case, regardless of the evidence?
>
> A: I don't know. I guess if it was proven to me, I guess I could.
>
> Q: If what was proven to you?
>
> A: I would have to be–I would have to absolute [sic] know for sure, I mean no doubt whatsoever.
>
> . . . .
>
> Q: You could not impose the death penalty regardless of what the evidence is?
>
> A: I don't believe so.
>
> MR. WANNAMAKER [district attorney]: If your Honor please, we challenge for cause.
>
> THE COURT: I understand, Mrs. Neal. I know this is very difficult for you, but it's necessary to have your candid and frank answers and I thank you for them. Do I understand that you could not even before you hear the testimony under any circumstances, impose the death penalty?
>
> MARY D. NEAL [prospective juror]: No, I just don't think so.

Id. at 54-55, 292 S.E.2d at 239 (Exum, J., dissenting).

Justice Exum's dissent in *Pinch* analyzed the *Witherspoon* decision and subsequent Supreme Court decisions that aid in the evaluation of death-qualification practices.[56] He concluded that at least two prospective jurors had been excluded improperly for cause.[57] Although the majority thought the proper standard was whether it was established that a potential juror " 'would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case,' "[58] Justice Exum determined that *Witherspoon* had been more explicit in its guidance. Quoting extensively from *Witherspoon*, Justice Exum identified key language in that decision.[59] According to Justice Exum's interpretation of *Witherspoon*, the prospective juror must make it "unmistakably clear" that he is "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, before excusal for cause is proper.[60] This interpretation is consistent with several subsequent Supreme Court decisions that Justice Exum also discussed.[61]

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56. *Id.* at 49-56, 292 S.E.2d at 236-40 (Exum, J., dissenting).

57. *Id.* at 49, 292 S.E.2d at 236-37 (Exum, J., dissenting).

58. *Id.* at 9, 292 S.E.2d at 213 (Exum, J., dissenting) (quoting *Witherspoon*, 391 U.S. at 522 n.21).

59. *Id.* at 49-50, 292 S.E.2d at 237 (Exum, J., dissenting).

> "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it . . . . [A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death . . . . [A] jury composed exclusively of . . . people [who believe in the death penalty] cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for [those who believe in the death penalty]."
>
> "If the State had *excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death*, it could argue that the resulting jury was simply 'neutral' with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die."

Id. at 49-50, 292 S.E.2d at 237 (Exum, J., dissenting) (quoting *Witherspoon*, 391 U.S. at 519-21) (emphasis added in *Pinch*).

Justice Exum added:

> "[A] prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before 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 the veniremen were excluded on any broader basis than this, the death sentence cannot be carried out . . . ."

Id. at 50-51, 292 S.E.2d at 237 (quoting *Witherspoon*, 391 U.S. at 522 n.21).

60. *Id.* at 51, 292 S.E.2d at 237-38 (Exum, J., dissenting).

61. *Id.* at 51-53, 292 S.E.2d at 237-39 (Exum, J., dissenting). *See* Adams v. Texas, 448 U.S. 38 (1980) (juror may not be excused simply because deliberations "affected" by death penalty attitudes); Davis v. Georgia, 429 U.S. 122 (1976) (per curiam) (if even one juror is excused in violation of *Witherspoon*, death sentence cannot stand); Boulden v. Holman, 394 U.S. 478, 483-84

Justice Exum's opinion also quoted language from *Boulden* which established that merely because a juror has " 'a fixed opinion against' " capital punishment or does not " 'believe in' capital punishment," that juror is not precluded from being "perfectly able as a juror to abide by existing law–to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case."[62] Justice Exum recognized that "[j]urors may be excused for cause . . . if their opposition to the death penalty is so strong that they cannot take an oath to 'follow the law. . . .' "[63] He recognized, however,[64] that this right to excuse jurors is limited by *Adams v. Texas*,[65] in which the Supreme Court held that it was not sufficient to excuse for cause jurors who stated that their deliberations would be "affected" by death penalty views.[66]

Justice Exum cited a North Carolina Supreme Court case, *State v. Bernard*,[67] for the proposition "that a juror could not be excused merely because 'he *thought* he would automatically vote against the imposition of the death penalty regardless of the evidence.' "[68] *Bernard* was decided in 1975. Since then the majority of the court has never found that the exclusion of a potential juror for a response of "I think" or "I believe" was a violation of *Witherspoon*. Even though the court recognized a violation in *Bernard*, the court held that a single violation was not sufficient for reversal; only systematic exclusion in violation of *Witherspoon* constituted reversible error.[69] Justice Exum, in his *Pinch* dissent, took issue with that interpretation and cited the Supreme Court's *Davis* decision, which established that a death sentence cannot stand even if one juror was excused in violation of the *Witherspoon* limitations.[70]

In analyzing the *voir dire* of two excluded jurors, Justice Exum clearly identified *Witherspoon* violations. One juror admitted that she would have to be certain of defendant's guilt before imposing the death penalty.[71] Justice Exum correctly recognized that, although the juror's deliberations would be "affected" by her death penalty attitudes, she never said that she would automatically vote against imposition of the death penalty.[72] Reservations of the type expressed by that juror do not constitute permissible *Witherspoon* exclu-

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(1969) (statement that juror who has "a fixed opinion against [capital punishment] or who does not believe in capital punishment" does not justify excusal).

62. *Pinch*, 306 N.C. at 51, 292 S.E.2d at 238 (Exum, J., dissenting) (quoting Boulden v. Holman, 394 U.S. 478, 483-84 (1969). *See supra* notes 36-38 and accompanying text.

63. *Pinch*, 306 N.C. at 51, 292 S.E.2d at 238 (Exum, J., dissenting) (quoting Lockett v. Ohio, 438 U.S. 586, 595-96 (1978)).

64. *Id.* (Exum, J., dissenting).

65. 448 U.S. 38 (1980). *See supra* notes 31-33 and accompanying text.

66. *Id.* at 49.

67. 288 N.C. 321, 218 S.E.2d 327 (1975).

68. *Pinch*, 306 N.C. at 53, 292 S.E.2d at 239 (Exum, J., dissenting) (quoting *Bernard*, 288 N.C. at 325, 218 S.E.2d at 330).

69. *Bernard*, 288 N.C. at 325-27, 218 S.E.2d at 330-31.

70. *Pinch*, 306 N.C. at 53, 292 S.E.2d at 238-39 (Exum, J., dissenting) (citing Davis v. Georgia, 429 U.S. 122 (1976) (per curiam)).

71. *Id.* at 54-55, 292 S.E.2d at 239 (Exum, J., dissenting).

72. *Id.* at 55, 292 S.E.2d at 240 (Exum, J., dissenting).

sion justifications in light of *Adams v. Texas*.[73] The second juror whose exclusion Justice Exum questioned had expressed a preference for life imprisonment in a capital case. The juror's answers to further inquiry by the court, however, were ambiguous because the questions asked by the court were not worded clearly. Relying on *Boulden v. Holman*, in which the Supreme Court held that death qualification *voir dire* must be analyzed in light of the meaning veniremen would attach to questions, Justice Exum concluded that the record did not indicate clearly the juror's unequivocal refusal to impose the death penalty and therefore his exclusion from the *Pinch* trial was improper.[74]

Looking solely at *Witherspoon* and subsequent Supreme Court decisions clarifying *Witherspoon*, it appears that Justice Exum's analysis in *Pinch* expresses the better interpretation of Supreme Court limitations on death qualification. The majority of the North Carolina Supreme Court, however, has refused to consider post-*Witherspoon* messages from the Court. One could conclude that North Carolina is gradually returning to pre-*Witherspoon* practice because, after *Bernard*, the standards applied by the supreme court in determining whether an exclusion is permissible have been relaxed.[75] If *Witherspoon* is accepted as adequate protection for capital-case defendants, North Carolina courts fail miserably in their application of death qualification. The standards established by the Supreme Court definitely are not met.

Even where *Witherspoon* is correctly applied, a defendant may still have constitutional grounds to challenge the death penalty. The Supreme Court recognized in *Witherspoon* that its holding in that case might, at some future time, prove to be insufficient to protect the constitutional rights of capital defendants.[76] The *Witherspoon* Court was presented with several studies that indicated that a death-qualified jury was conviction-prone or would favor the prosecution.[77] Defendant in *Witherspoon* argued that these studies demonstrated that death qualification violated defendant's sixth amendment right to an impartial jury.[78] The defense in *Witherspoon* also contended that defendant's sixth amendment guarantee of a jury representing a fair cross-section of the community was violated by the systematic exclusion of all those who would never impose the death penalty.[79]

The *Witherspoon* Court concluded that the studies on the conviction-proneness issue were "too tentative and fragmentary" and refused to rule on

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73. *See supra* notes 31-33 and accompanying text.

74. *Pinch*, 306 N.C. at 53, 55-56, 292 S.E.2d at 239-40 (Exum, J., dissenting).

75. The North Carolina Supreme Court was much more insistent that excused jurors express unequivocal refusal to impose the death penalty in earlier cases. *See, e.g.*, *Bernard*, 288 N.C. 321, 218 S.E.2d 327 (1975).

76. *Witherspoon*, 391 U.S. at 520 n.18.

77. Three studies were presented to the Supreme Court in *Witherspoon*. *Id.* at 517 n.10. The studies at that time were in rough form and not statistically complete. These studies have since been expanded. *See infra* note 86.

78. *Witherspoon*, 391 U.S. at 516.

79. *Id.* at 512.

the sixth amendment right-to-an-impartial-jury issue.[80] The Court, however, did reverse defendant's death sentence because execution of the sentence "would deprive him of his life without due process of law."[81] Although the Court decided this death qualification case on due process grounds, the Court recognized that sixth and fourteenth amendment jury issues were at stake and left open the door to future death-qualification attacks based on those sixth amendment issues. In a footnote, the Court suggested that some future defendant might establish successfully that a death-qualified jury was conviction-prone.[82] Should such proof be tendered and accepted, the language of the Court clearly indicated that conviction by a death-qualified jury would violate defendant's constitutional rights and require a reversal.[83] The *Witherspoon* Court further suggested that a bifurcated trial, "using one jury to decide guilt and another to fix punishment," would accommodate both state and individual defendant interests.[84] Since *Witherspoon*, capital defendants have sought diligently to be that "future case" to which the Court referred.[85] Additional studies have been conducted on the effects of death qualification and their results have been reported.[86] Capital defendants have taken this cue

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80. *Id.* at 517.

81. *Id.* at 523.

82. After holding that the current evidence did not prove conclusively that death qualification produced a conviction-prone jury or less than representative jury on the issue of guilt, the Court said:

> Even so, a defendant convicted by such a jury [one death-qualified] in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt*. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence–given the possibility of accomodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution.

Id. at 520 n.18.

83. *Id.* at 522 n.20.

84. *Id.* at 520 n.18.

85. *See* White, *supra* note 2, at 359.

86. For a general discussion of the available data, see Girsh, *The* Witherspoon *Question: The Social Science and the Evidence*, 35 NLADA BRIEFCASE 99 (1978).

Several studies have been accepted as conclusive on the two sixth amendment issues. *See* Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California*, 3 WOODROW WILSON J.L. 11 (1981) [hereinafter cited as Bronson - *California*]; Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1 (1970); Goldberg, *Toward Expansion of* Witherspoon: *Capital Scruples, Jury Bias, and the Use of Psychological Data to Raise Presumptions in the Law*, 5 HARV. C.R.-C.L. L. REV. 53 (1970) (one of three studies before the Supreme Court in *Witherspoon*); Jurow, *New Data on the Effects of a "Death-Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1970); Ellsworth & Fitzgerald, Due Process v. Crime Control: The Impact of Death Qualification on Jury Attitudes, (prepublication draft 1979) [hereinafter cited as Ellsworth - Attitude Survey]; Ellsworth, Thompson, & Cowan, The Effect of Capital Punishment Attitudes on Juror Perceptions of Witness Credibility, (unpublished draft 1979) [hereinafter cited as Ellsworth - Juror Perceptions]; Ellsworth, Thompson & Cowan, Juror Attitudes Towards the Death Penalty and Predisposition to Convict, (unpublished draft 1979) [hereinafter cited as Ellsworth — Conviction-Proneness]; Haney, *supra* note 41; Harris & Associates, Study No. 814002 (1981) [hereinafter cited as Harris - 1981]; Harris & Associates, Study No. 2106 (1971) [hereinafter cited as Harris—1971]; Wilson, Belief in Capital Punishment and Jury Performance, (unpublished 1964) (one of three studies before the Supreme

from the Supreme Court, and attacks premised on the contention that death qualification produces a conviction-prone jury are widespread.

Although the *Witherspoon* majority briefly noted defendant's argument that death qualification deprived him of a trial by a jury composed of a fair cross-section of the community, Justice Douglas, in a separate opinion, heartily embraced the fair cross-section argument. Justice Douglas concluded that Witherspoon's conviction, as well as his sentence, should have been reversed.[87] Relying on previous Court decisions,[88] Justice Douglas concluded that death qualification resulted in the "systematic exclusion of qualified groups."[89] Although the *Witherspoon* majority refused to reverse the conviction because defendant had not proven that the jury was "less than neutral with respect to *guilt*,"[90] Justice Douglas stated that "we do not require a showing of specific prejudice when a defendant has been deprived of his right to a jury representing a cross-section of the community."[91] Justice Douglas found that death qualification robbed the jury of "certain peculiar qualities of human nature" and noted that "some prejudice does result and many times will not be subject to precise measurement."[92]

The Supreme Court's decision in *Taylor v. Louisiana*[93] is consistent with Justice Douglas' position in *Witherspoon*. In *Taylor*, a case not involving death qualification, the Court determined that there is a fundamental right to a jury comprised of a representative cross-section of the community.[94] The Court held that the systematic exclusion of "distinct groups" is forbidden.[95] In a

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Court in *Witherspoon*); Zeisel, Some Data on Juror Attitudes Toward Capital Punishment (Univ. of Chicago Center for Studies on Criminal Justice, 1968) (another of the three studies before the Supreme Court in *Witherspoon*).

Additional studies on the death qualification issue are: Boehm, *Mr. Prejudice, Miss Sympathy and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias,* 1968 WIS. L. REV. 734; Mitchell & Byrne, *The Defendant's Dilemma: Effects of Jurors' Attitudes and Authoritarianism on Judicial Decisions*, 25 J. PERSONALITY & SOC. PSYCH. 123 (1973); Rokeach & McLellan, *Dogmatism and the Death Penalty: A Reinterpretation of the Duquesne Poll Data*, 8 DUQ. L. REV. 125 (1969-70).

87. *Witherspoon*, 391 U.S. at 531 (Douglas, J., concurring).

88. *See id.* at 524 n.1 (Douglas, J., concurring).

89. *Id.* at 528 (Douglas, J., concurring). Justice Douglas relied in part on Ballard v. United States, 329 U.S. 187 (1964). In *Ballard*, a federal grand jury selection system that systematically excluded women was held unconstitutional. *Id.* at 193.

90. *Witherspoon*, 391 U.S. at 520 n.18.

91. *Id.* at 531 (Douglas, J., concurring). Justice Douglas again was relying on Ballard v. United States, 329 U.S. 187, 195 (1946) (federal grand jury system that systematically excluded women held unconstitutional; error not dependant on showing of individual prejudice). The Court did not adopt this position concerning state jury selections until Taylor v. Louisana, 419 U.S. 522 (1975). *See infra* notes 93-95 and accompanying text.

92. *Witherspoon*, 391 U.S. at 531 (Douglas, J., concurring). Elsewhere in his opinion, Justice Douglas referred to the " 'subtle interplay of influence' " that jurors exert over one another. *Id.* at 530 (Douglas, J., dissenting) (quoting Battle v. United States, 329 U.S. 187, 193 (1946)). These subtle influences are critical in the representative jury. The defendant, however, is not entitled to a jury partial to him. *Id.* at 530 (Douglas, J., concurring).

93. 419 U.S. 522 (1975).

94. *Id.* at 530. In Williams v. Florida, 399 U.S. 78, 100 (1970), the Court concluded that a criminal trial jury should be a group of laymen representative of a cross-section of the community. Such a jury, however, was not declared a fundamental right until *Taylor* in 1975.

95. *Taylor*, 419 U.S. at 530. The jury selection procedure struck down in *Taylor* systematically excluded women, who accounted for 53% of the citizens eligible for jury service in that

later decision, *Duren v. Missouri*,[96] the Court placed the burden upon defendant to prove that a jury was not representative.[97] Once a defendant establishes the prima facie case of an unrepresentative jury, the state must justify the practice causing systematic exclusion.[98] If systematic exclusion is shown, it is presumed that the defendant was prejudiced.[99]

These arguments—that death qualification results in a conviction-prone jury and that death qualification denies a defendant his right to a representative jury—call into question the conviction, as well as the death penalty sentence of a capital defendant. Several courts have analyzed the studies on death qualification and have considered the fair cross-section argument as it affects the validity of the defendant's conviction.[100] Until recently, both arguments have been rejected.[101]

In 1983 and 1984, however, two federal district courts accepted both arguments and held that death qualification prior to the guilt phase of the capital trial is unconstitutional and a conviction rendered by a death-qualified jury must be reversed.[102] One of these decisions, *Keeten v. Garrison*,[103] was rendered by Judge McMillan of the United States District Court for the Western District of North Carolina. Several studies were presented to the court in *Keeten*. Judge McMillan held that these studies clearly established that death qualification yielded a conviction-prone jury.[104] In addition, Judge McMil-

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district. *Id.* at 531. The result in *Taylor* is consistent with Justice Douglas's opinion that death qualification should be forbidden because it results in the "systematic exclusion of qualified groups, and the deprivation to the accused of a cross-section of the community for decision on both his guilt and his punishment." *Witherspoon*, 391 U.S. 510, 528 (Douglas, J., dissenting). Previous Supreme Court decisions had forbidden the exclusion of various classes from a jury. *See* Peters v. Kiff, 407 U.S. 493 (1972) (systematic exclusion of blacks violated due process); Hernandez v. Texas, 347 U.S. 475 (1954) (systematic exclusion of Mexican-Americans violated due process); Ballard v. United States, 329 U.S. 187 (1946) (systematic exclusion of women violated due process); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) (jury selection system which systematically excluded daily wage earners invalid); Strauder v. West Virginia, 100 U.S. 303 (1879) (statute which effectively denied blacks the right to serve as jurors unconstitutional).

96. 439 U.S. 357 (1979).

97. The Court declared that:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at 364. *See also* United States v. Espinoza, 641 F.2d 153, 168 (4th Cir. 1981) ("Systematic exclusion must be proven; it will not be presumed.").

98. The state must prove that "a significant state interest [is] manifestly and primarily advanced by those aspects of the jury selection process . . . that result in the disproportionate exclusion of a distinctive group." *Duren*, 439 U.S. at 267-68.

99. *See* Peters v. Kiff, 407 U.S. 493, 503-05 (1972).

100. *See, e.g.*, Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979); Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980).

101. *See supra* note 100.

102. *See* Keeten v. Garrison, 578 F. Supp. 1164 (W.D.N.C. 1984); Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983).

103. 578 F. Supp. 1164 (W.D.N.C. 1984).

104. *Id.* at 1181-82. Judge McMillan analyzed the results of twelve different studies. These studies consistently revealed that death qualification resulted in prosecution-prone juries. The

lan, analyzing death qualification in North Carolina in light of *Duren*, concluded that defendants had established a prima facie case of systematic exclusion of a distinct group and that the state interests could be advanced equally by using a bifurcated jury system as suggested in the *Witherspoon* footnote.[105] The studies presented on the conviction-prone issue also applied to the cross-section issue, establishing that those who would never impose the death penalty were a "distinctive group" for *Duren* purposes.[106] *Keeten* granted habeas corpus relief to three North Carolina defendants who had been denied relief by the North Carolina Supreme Court.[107]

The North Carolina Supreme Court has been presented with some of the same studies as those that were before the *Keeten* court.[108] All contentions that death qualification violates the defendant's rights to a representative jury or results in a conviction-prone jury, however, have been rejected. The supreme court has based its holdings on language in *Witherspoon* that rejected the studies presented in that case.[109] The majority of the court, however, has totally ignored the *Witherspoon* footnote suggesting that a future case might establish prejudice due to death qualification.[110] The *Witherspoon* footnote has been discussed by Justice Exum in dissent. In his dissent in *State v. Avery*,[111] Justice Exum concluded that defendant had proved both the fair cross-section and conviction-prone jury arguments. Justice Exum analyzed the data before the supreme court and concluded that defendant had met the stronger

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court found a consensus among trial judges and academic authorities that the most critical factor in a juror's determination of guilt or innocence is the weight of the evidence. Consequently, the exclusion of those unwilling to impose the death penalty becomes most significant in close cases. The court concluded that: "It is in these close cases that criminal defendants most need the protection of the Sixth Amendment." *Id.* at 1185. Based on the studies examined and expert testimony, Judge McMillan found that there is as much as a 10% higher conviction rate in close cases when juries are death-qualified. *Id.*

105. *Id.* at 1181, 1186-87.

106. Judge McMillan found that those unwilling to impose the death penalty shared common attitudes toward the criminal justice system that separated them from other groups, even those generally opposed to the death penalty, and that those attitudes favored the defense. *Id.* at 1181. If these persons are excluded from jury service, "[n]o one else will represent their strong viewpoint on the jury in their absence." *Id.* at 1182 (quoting Grigsby v. Mabry, 569 F. Supp. 1273, 1283 (E.D. Ark. 1983)). In addition to finding that those unwilling to impose the death penalty shared common views and attitudes, the studies showed that a disproportionate number of blacks and women are excluded due to death qualification. *Id. See also* Grigsby v. Mabry, 569 F. Supp. 1273, 1283 (E.D. Ark. 1983); State v. Avery, 299 N.C. 126, 144-45, 261 S.E.2d 803, 814-15 (1980) (Exum, J., dissenting). Thus the group excluded by death qualification is distinct and identifiable, in attitude, composition, and size.

107. *Keeten*, at 1187.

108. In his dissent in State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980), Justice Exum analyzed several studies. Among them were Boehm, *supra* note 86; Harris—1971, *supra* note 86; Jurow, *supra* note 86; Ziesel, *supra* note 86. Professor Ziesel has appeared before the North Carolina Supreme Court. *See* 299 N.C. at 143-45, 261 S.E.2d 813-14 (Exum, J., dissenting).

109. The court has insisted on quoting the following *Witherspoon* language: "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." *Witherspoon*, 391 U.S. at 517-18. *See, e.g.*, State v. Avery, 299 N.C. 126, 137, 261 S.E.2d 803, 810 (1980).

110. *See supra* notes 82-86 and accompanying text.

111. 299 N.C. 126, 139-40, 147, 261 S.E.2d 803, 811, 816 (1980) (Exum, J., dissenting).

evidentiary showing suggested by the *Witherspoon* court.[112] Justice Exum applied the *Duren* reversal requirements and concluded that those who would never impose the death penalty do form a distinct, identifiable group and that death qualification results in the systematic exclusion of that group.[113] In addition, Justice Exum found that the data indicated that those not opposing the death penalty did favor the prosecution.[114] The evidence was more persuasive than that available to the Supreme Court in *Witherspoon*;[115] death qualification resulted in a conviction-prone jury that was not impartial as required by the sixth amendment.[116]

Is *Witherspoon* adequate protection for capital defendants? To determine the adequacy of *Witherspoon* there must be two levels of analysis, the adequacy of protection at the guilt stage and the adequacy of protection at the sentencing stage of the capital trial.

Witherspoon and the subsequent Supreme Court decisions afford a capital defendant adequate protection at the sentencing stage of trial. It is accepted that those who automatically would vote against the death penalty in any case should be excluded from sentencing because they are unable to apply the law impartially.[117] Supreme Court limitations forbid the exclusion of those with less than unequivocal resolution never to impose the death penalty. If death qualification practices truly conformed with the Supreme Court standards, the constitutional rights of capital defendants would be protected at the sentencing phase of their trials. North Carolina practice, however, does not conform with those Supreme Court limitations.

Witherspoon does not, however, afford adequate protection at the guilt phase of a capital trial. The Court in *Witherspoon* left open the possibility that defendants might establish prejudice from death qualification at the guilt phase of trial.[118] Although at the time *Witherspoon* was decided a single jury decided guilt and fixed the sentence, the Court recognized two separate jury functions.[119] Presently, all states that retain capital punishment provide for a bifurcated jury system in capital trials.[120] The *Witherspoon* Court suggested that a bifurcated trial, in which separate juries determine guilt and sentence, would adequately protect a capital defendant should death qualification ever be proved to result in a less than impartial jury at the guilt phase.[121] Because

112. *Id.* at 147, 261 S.E.2d at 816 (Exum, J., dissenting).

113. *Id.* at 145, 261 S.E.2d at 815 (Exum, J., dissenting).

114. *Id.* at 143-47, 261 S.E.2d at 813-16 (Exum, J., dissenting).

115. *Id.* at 147, 261 S.E.2d at 816 (Exum, J., dissenting).

116. Justice Exum based his dissent on the fact that death qualifying resulted in an unrepresentative jury, depriving defendant of his right to a jury of a fair cross-section of the community. Justice Exum concluded, however, that "studies and data presented in this case do consistently and forcefully suggest that a jury culled of those who would not vote for the death penalty is in fact a jury prone to convict on the guilt phase." *Id.* at 147, 261 S.E.2d at 816 (Exum, J., dissenting).

117. *See Keeten* at 1183.

118. *See supra* notes 82-86 and accompanying text.

119. *Witherspoon*, 391 U.S. at 518.

120. *See supra* note 19 and accompanying text.

121. *See supra* note 84 and accompanying text.

state courts probably are unwilling to use separate juries absent a mandate from the United States Supreme Court,[122] the Supreme Court should mandate one of two procedures. The more extreme and costly option would be to require entirely separate juries to determine guilt and the appropriate sentence. The more practical option is to forbid death qualification at the guilt phase, but allow excusal of those who would refuse automatically to impose the death penalty at the sentencing stage. Those excused could be replaced by alternate jurors. The North Carolina death penalty statute could be read to provide for this second option,[123] but the North Carolina Supreme Court has interpreted the statute to require a single jury. Therefore, the guidance of the United States Supreme Court is necessary to force the steps to protect adequately the rights of capital defendants. It is likely that the Supreme Court will have the opportunity to render such guidance as *Keeten* and *Grigsby v. Mabry*,[124] a second case reversing defendant's conviction on death qualification grounds, are appealed.

Until the North Carolina Supreme Court properly applies the standards established in *Witherspoon* and the United States Supreme Court provides ad-

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122. *See, e.g.*, State v. Taylor, 304 N.C. 249, 260, 283 S.E.2d 761, 769 (1981), *cert. denied*, 103 S. Ct. 3552 (1983) ("[I]t is intended that the same jury should hear both phases of the trial unless the original jury is 'unable to reconvene.' ") (quoting N.C. GEN. STAT. § 15a-2000(a)(2) (1983)).

123. N.C. GEN. STAT. § 15A-2000 (1983):

> (a) Separate Proceedings on Issue of Penalty.—
>
> (1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.
>
> (2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.
>
> (3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled . . . .

Three provisions in the statute seem to indicate that the legislature did not intend an absolute "same jury" requirement. First, the statute allows for an alternate juror to become part of the sentencing jury if any of the convicting jurors are "disqualified" or "discharged for any reason." This would permit substitution for those unwilling to impose the death penalty who served on the guilt phase jury. Second, "[i]f the trial jury is unable to reconvene for a hearing on the issue of penalty . . . , the trial judge shall impanel a new jury to determine the issue of punishment." Finally, the legislature made provision for a second presentation of evidence in the event a new jury is impanelled for sentencing.

The only argument made against bifurcated trials by the State in *Keeten* was that the cost "would be too much of a burden . . . on the taxpayers." *Keeten*, 578 F. Supp. at 1186. The argument was dismissed summarily by the court. "Such costs, if any, are trivial compared with the human rights and constitutional issues at stake." *Id.* at 1167-68. "North Carolina can afford the few extra dollars, if any, that it might cost to provide fair trials to persons accused of capital felonies." *Id.* at 1187.

124. 569 F. Supp. 1273 (E.D. Ark. 1983).

equate guidelines eliminating death qualification at the guilt phase of capital trials, it appears that the rights of North Carolina capital defendants will continue to be violated. The existing law in North Carolina provides for adequate protection of capital defendants' sixth amendment rights. This law, however, has been thwarted by the North Carolina Supreme Court's limited interpretation.[125]

A criminal defendant has a guaranteed right to be tried by a jury of his peers. This jury must be impartial and composed of a representative cross-section of the community. Anything less violates a defendant's sixth and fourteenth amendment rights. Death qualification prior to a determination of guilt threatens not only the liberty of North Carolina defendants, but the very life that both the United States and North Carolina Constitutions have long sought to protect and preserve.

RAMONA J. CUNNINGHAM

125. In 1983 five North Carolina defendants appealed their convictions and death penalty sentences. In each case, the North Carolina Supreme Court rejected any attacks on death qualification and refused to reexamine its position. This position will continue to allow the sixth amendment rights of capital defendants to be violated in North Carolina.