



6-1-2022

Death Prone Jurors: The Disintegration of the Witherspoon Rule in Texas.

Mary Elizabeth Carmody

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Civil Procedure Commons](#)

Recommended Citation

Mary Elizabeth Carmody, *Death Prone Jurors: The Disintegration of the Witherspoon Rule in Texas.*, 9 St. MARY'S L.J. (2022).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol9/iss2/6>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

DEATH PRONE JURORS: THE DISINTEGRATION OF THE *WITHERSPOON* RULE IN TEXAS

MARY ELIZABETH CARMODY

The fluctuating views of the American people toward capital punishment, together with the accused's right to be tried by an impartial jury, have created a unique dilemma for the judiciary when selecting juries to sit in capital cases. In 1968, although the death penalty was still being assessed by juries on defendants convicted of capital offenses, the attitude of the American public revealed some disenchantment with its imposition.¹ At that time state statutes allowed the prosecution to challenge for cause any prospective juror who held "conscientious scruples" against the infliction of the death penalty.² Jury panels selected in this manner appeared to be "death-qualified." The United States Supreme Court attempted to curtail this practice in *Witherspoon v. Illinois*.³ The court ruled that a prospective juror in a capital case could not be excused unless he made "unmistakably clear" that he would not, under any circumstances, vote for the imposition of capital punishment, or that the juror's attitude would not allow him to make an "impartial decision as the defendant's *guilt*."⁴ This issue became temporarily moot in 1972, however, when the Court declared capital punishment unconstitutional because of the discretion state statutes allowed juries in determining whether or not guilty defen-

1. The United States Supreme Court in *Witherspoon v. Illinois*, 391 U.S. 510 (1968) noted a 1966 survey which showed 42% of the American public in favor of capital punishment for persons convicted of murder, 47% opposed, and 11% undecided. The study had been conducted by the American Institute of Public Opinion and designed to be representative of the views of American adults (21 and older). Approximately 1,523 people were interviewed. *Id.* at 520 n.16; M. HINDE LANG, C. DUNN, L. SUTTON & A. AUMICK, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 1973 at 50 (1973). A similar study in 1972, conducted by the same organization interviewing 3,347 Americans, 18 and older, found 50% in favor, 41% opposed and 9% undecided. *Id.* at 153. A 1970 survey by Louis Harris & Associates questioned American men and women (21 and older) with regard to their feelings about capital punishment in the abstract. The study showed that of women nationwide, 39% favored capital punishment, 46% opposed and 15% not sure. The study further indicated that 55% of the American men interviewed believed in capital punishment, 37% opposed and 8% not sure. *Id.* at 152.

2. See, e.g., ILL. REV. STAT., ch. 38, § 743 (1959) (repealed 1964); OKLA. STAT. ANN. tit. 22, § 660 (1969); TEX. CODE CRIM. PROC. ANN. art. 35.16(b)(1) (1966).

3. 391 U.S. 510 (1968). "Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution." *Id.* at 523.

4. *Id.* at 522-23 n.21. This decision applied retroactively. *Id.* at 523 n.22. The sixth amendment to the United States Constitution provides in part: "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 (emphasis added).

dants should be put to death.⁵ In July, 1976, the Court resurrected the death penalty and the concomitant jury selection problem when it held that the statutory schemes for its imposition, as enacted by three states, complied with the mandates of the eighth and fourteenth amendments.⁶

The qualification of jurors in death penalty cases has been controversial in Texas both prior and subsequent to the enactment of the state's new death penalty statutes.⁷ In the nine years following *Witherspoon*, the Texas courts have been, for the most part, erratic in implementing its tenets.⁸ The Texas Court of Criminal Appeals recently held that *Witherspoon* considerations are unnecessary when a juror is disqualified under section 12.31(b) of the new Penal Code.⁹ That section requires a mandatory oath stating that a juror in a capital case will not allow the penalty imposed to "affect his deliberation on any issue of fact."¹⁰

Although the Texas Legislature restructured the statute in an attempt to comply with the mandate of *Witherspoon*, the present interpretation by the Texas judiciary excludes *Witherspoon's* application altogether.¹¹ An

5. See *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972). Mr. Justice Brennan and Mr. Justice Marshall agreed that one of the reasons at that time for the invalidity of the death penalty was that it was morally unacceptable to many Americans. See *id.* at 295, 360; *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (eighth amendment must be applied in way that reflects evolving moral standards of the country).

6. *Gregg v. Georgia*, ___ U.S. ___, ___, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859, 893 (1976); *Jurek v. Texas*, ___ U.S. ___, ___, 96 S. Ct. 2950, 2958, 49 L. Ed. 2d 929, 941 (1976); *Proffitt v. Florida*, ___ U.S. ___, ___, 96 S. Ct. 2960, 2970, 49 L. Ed. 2d 913, 927 (1976). Two other states, however, had their death penalties declared unconstitutional at the same time. *Roberts v. Louisiana*, ___ U.S. ___, ___, 96 S. Ct. 3001, 3008, 49 L. Ed. 2d 974, 983 (1976); *Woodson v. North Carolina*, ___ U.S. ___, ___, 96 S. Ct. 2978, 2992, 49 L. Ed. 2d 944, 961-62 (1976). The eighth amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII (emphasis added). This amendment is made applicable to the states through the fourteenth amendment. See *Robinson v. California*, 370 U.S. 660, 666 (1962).

7. See, e.g., *Brock v. State*, No. 53,108, slip op. at 3-6 (Tex. Crim. App. June 14, 1977); *Burns v. State*, No. 50,576, slip op. at 4-14 (Tex. Crim. App. May 3, 1977); *Hovila v. State*, 532 S.W.2d 293, 294-95 (Tex. Crim. App. 1975); *Tezeno v. State*, 484 S.W.2d 374, 380-84 (Tex. Crim. App. 1972); *Grider v. State*, 468 S.W.2d 393, 398-400 (Tex. Crim. App. 1971); *Ellison v. State*, 432 S.W.2d 955, 956-57 (Tex. Crim. App. 1968). See also TEX. PENAL CODE ANN. §§ 12.31, 19.03 (1974); TEX. CODE CRIM. PROC. ANN. art. 37.071 (Supp. 1976-77).

Editor's Note: The following cases, cited throughout this comment have not been published, pending the issuance of a mandate by the Court of Criminal Appeals: *Brock v. State*, *Burns v. State*, *Shippy v. State*, *Whitmore v. State*. These decisions, therefore, may be altered or withdrawn prior to publication.

8. See cases cited note 7 *supra*.

9. *Burns v. State*, No. 50,576, slip op. at 6-7 (Tex. Crim. App. May 3, 1977); *Shippy v. State*, No. 53,831, slip op. at 5 (Tex. Crim. App. April 27, 1977); *Whitmore v. State*, No. 52,325, slip op. at 5-6 (Tex. Crim. App. Oct. 13, 1976); *Moore v. State*, 542 S.W.2d 664, 672 (Tex. Crim. App. 1976).

10. TEX. PENAL CODE ANN. § 12.31(b) (1974).

11. See cases cited note 9 *supra*.

examination of how and why this paradoxical interpretation developed in Texas exposes the need for both greater guidance in this area from the Supreme Court and compliance in application of the rule by the Texas courts.

THE *Witherspoon* LINEAGE

The narrow issue presented in *Witherspoon v. Illinois*¹² arises in most, if not all, capital cases. The question involved was whether the state might challenge for cause a prospective juror who stated during voir dire examination that he or she held conscientious scruples against the infliction of the death penalty.¹³ The defendant contended that the exclusion of "scrupled" jurors resulted in jury eligibility only for those veniremen who favored, or were neutral toward, the infliction of the death penalty.¹⁴ The result, according to the defendant, was a conviction-prone jury that was biased in favor of the ultimate penalty.¹⁵

Although the Court did not believe the data adduced by the defendant was applicable to the determination of *guilt*, the majority found the jury selection procedure did not ensure a panel that was impartial regarding the *punishment* imposed.¹⁶ Noting that the national attitude toward capital punishment was shifting against the death penalty,¹⁷ the Court found that a jury selected by the procedure in *Witherspoon* could represent the view of a minority of the community.¹⁸ Therefore, in order to avoid producing a jury "uncommonly willing to condemn a man to die,"¹⁹ the Court enunciated a two-prong test to preserve the impartiality of a jury in a capital case. The Court held that only those veniremen may be excluded who make "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

12. 391 U.S. 510 (1968).

13. *Witherspoon v. Illinois*, 391 U.S. 510, 513-14 (1968). Forty-seven veniremen had been excused for cause under an Illinois statute which allowed the prosecution to challenge any juror who expressed a general objection to the death penalty. *Id.* at 514.

14. *Id.* at 516-17.

15. *Id.* at 516-17.

16. *Id.* at 519. Mr. Justice Stewart, writing for the majority, expressed the Court's view: [G]uided by neither rule nor standard "free to select or reject as it [sees] fit," 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.* at 519.

17. *Id.* at 520 n.16. See note 1 *supra*.

18. *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968). "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940). See generally 53 MINN. L. REV. 838, 843 (1969).

19. *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968).

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*.²⁰

The majority also held that the dictates of justice demanded a fully retroactive application of this test,²¹ which would affect only the death sentence and would not disturb the conviction of a defendant.²²

The *Witherspoon* holding came at the height of social criticism of the death penalty in the United States.²³ While the Court was not prepared to hold the death penalty unconstitutional at that time,²⁴ it did demand that veniremen in capital cases be willing to consider all potential punishments.²⁵ A juror would justifiably be excluded should he be "irrevocably committed" to vote against the death penalty regardless of the evidence produced at the trial.²⁶ A death penalty could not stand if a juror were excluded on any "broader basis."²⁷

In his dissent Mr. Justice Black identified a problem with the majority opinion in *Witherspoon* when he noted its ambiguity.²⁸ In his view the only change required by the majority was that the states must now specifically inquire whether a prospective juror would *automatically* vote against the infliction of the death penalty. He saw no significant difference in the composition of a jury after the application of the *Witherspoon* test. In effect, he perceived the majority holding to be a warning to the states to amend their jury selection procedures or risk reversal of their capital convictions as unconstitutional.²⁹

Although the two-pronged test appeared clear on its face, its practical implementation proved to be more difficult. The Court attempted to clarify the *Witherspoon* doctrine in *Boulden v. Holman*,³⁰ and reaffirmed the

20. *Id.* at 522 n.21.

21. *Id.* at 523 n.22. Twenty-seven states filed amicus curiae briefs asking for prospective application of any new constitutional decision on this point. The Court ruled against the request, because in its view the jury selection procedure involved undermined "the very integrity of the . . . process." *Id.* at 523 n.22.

22. *Id.* at 523 n.21. See also *Bumper v. North Carolina*, 391 U.S. 543, 545 (1968) (Court declined consideration of jury selection issue, where petitioner charged with capital offense received life sentence).

23. See note 1 *supra*. See generally H. BEDAU, *THE DEATH PENALTY IN AMERICA*, at 231-257 (1964).

24. See *Witherspoon v. Illinois*, 391 U.S. 510, 540 (1968) (White, J., dissenting).

25. *Id.* at 522 n.21.

26. *Id.* at 522 n.21.

27. *Id.* at 522 n.21. See generally Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 TEXAS L. REV. 545, 547-49 (1961); Comment, *Jury Challenges, Capital Punishment and Labat v. Bennett: A Reconciliation*, 1968 DUKE L.J. 283, 299-309.

28. *Witherspoon v. Illinois*, 391 U.S. 510, 538 (Black, J., dissenting).

29. *Id.* at 539 (Black, J., dissenting).

30. 394 U.S. 478 (1969).

need for a clear and unmistakable statement by the prospective juror.³¹ For the exclusion to be proper, a prospective juror must express a "total inability" to vote for the death penalty.³² In *Boulden* the Court found that eleven veniremen had been improperly excused when they indicated on voir dire that they had a "fixed position against capital punishment."³³ The majority set the standard by declaring that even a venireman who asserts a "fixed position against" the death penalty might still be able to "fairly consider" its imposition in a particular case.³⁴ The seeming infeasibility of applying this standard in practice became apparent: any competent defense attorney with an active imagination could, if allowed, illustrate a crime so heinous that even the most staunch opponent of capital punishment would agree to consider the death penalty as punishment.³⁵ Once that

31. *Id.* at 482.

32. *Id.* at 482 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 516 (1968)).

33. An excerpt of the voir dire was quoted in a footnote to the opinion and illustrates the manner in which the examination was conducted, and the respective exchanges between the court, the prosecution, and the defense as to selected veniremen.

[As to Venireman Nelson:]

THE COURT: Do you have a fixed opinion against capital or penitentiary punishment?

MR. NELSON: Capital punishment.

THE COURT: You think you would never be willing to inflict the death penalty in any type case?

MR. NELSON: Yes, sir.

MR. HUNDLEY: We challenge.

THE COURT: Defendant?

MR. CHENAULT: No questions.

[As to Venireman Collier:]

THE COURT: What is your position on capital or penitentiary punishment?

MR. COLLIER: I don't believe in capital punishment.

THE COURT: State?

MR. HUNDLEY: Challenge.

THE COURT: Any questions, Mr. Chenault?

MR. CHENAULT: No questions.

THE COURT: You are excused

[As to Venireman Seibert:]

THE COURT: Do you have a fixed opinion against capital punishment?

MR. SEIBERT: Yes, sir.

MR. HUNDLEY: We challenge.

THE COURT: Defendant?

MR. CHENAULT: No questions.

THE COURT: Stand aside. You are excused.

Boulden v. Holman, 394 U.S. 478, 482-83 & nn. 6 & 7 (1969).

34. *Id.* at 483-84. Although the voir dire examination conducted in *Boulden* appeared to be in violation of *Witherspoon*, the Court refused to determine the question and remanded the case for further examination of the record since the issue was first raised on appeal to the Supreme Court. *Id.* at 484.

35. See *State v. Forcella*, 245 A.2d 181, 196 (N.J. 1968) (prospective female juror excused who stated ability to vote for death penalty for rape but not for murder); *Smith v. State*, 437

concession is extracted from the prospective juror, he can no longer be excused for cause according to *Boulden*.³⁶ Moreover, in *Maxwell v. Bishop*,³⁷ the Court determined that such equivocal answers as "I think," "I'm afraid," and "I don't believe" did not satisfy the "unmistakably clear" standard of *Witherspoon*.³⁸

The deficiencies of the *Witherspoon* doctrine became obvious as the Court in *Boulden* and *Maxwell* began to review specific questions and answers asked on voir dire.³⁹ The general principles announced in these opinions did not provide the needed guidance for lower courts to determine whether an answer was acceptable under *Witherspoon*. Jury selection procedures in capital cases for a time provided a virtually automatic ground of appeal. The problem involved an enigma: The lower courts were in need of criteria in this area; in order to provide guidance, the Supreme Court would have to furnish a standard of acceptable answers under *Witherspoon*; if the Court were to provide such standards, its responsibilities could conceivably continue indefinitely.

TEXAS: THE RELUCTANT OFFSPRING

Pre-Furman Oscillation

The Texas Code of Criminal Procedure provides that the prosecution may challenge for cause any venireman who voices conscientious scruples against capital punishment.⁴⁰ This statute closely resembles the Illinois statute which was held to have "stacked the deck" against the defendant in *Witherspoon*.⁴¹ This similarity has provided fertile ground of appeal for

S.W.2d 835, 841 (Tex. Crim. App. 1968) (prospective juror excused who indicated possibility of voting for death penalty in murder but not in case at bar).

36. *Boulden v. Holman*, 394 U.S. 478, 482 (1968).

37. 398 U.S. 262 (1970) (per curiam).

38. *Id.* at 264-66. After the following colloquy a juror was successfully challenged:

Q. If you were convinced beyond a reasonable doubt at the end of this trial that the defendant was guilty and that his actions had been so shocking that they would merit the death penalty do you have any scruples about capital punishment that *might* prevent you from returning such a verdict?

A. I think I do.

Id. at 264.

39. See *Maxwell v. Bishop*, 398 U.S. 262, 263-64 (1970) (per curiam); *Boulden v. Holman*, 394 U.S. 478, 482-83 (1969).

40. TEX. CODE CRIM. PROC. ANN. art. 35.16(b)(1) (1966). This article provides: "A challenge for cause may be made by the State for any of the following reasons: 1. That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case, where the state is seeking the death penalty"

41. Compare ILL. REV. STAT. ch. 38, § 743 (1959) (repealed 1964) with TEX. CODE CRIM. PROC. ANN. art. 35.16(b)(1) (1966). The Illinois statute involved in *Witherspoon* provided: "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." ILL. REV. STAT. ch. 38, § 743 (1959) (repealed 1964).

defendants convicted of capital crimes in Texas.⁴²

Following the Supreme Court's decision in *Witherspoon*, the Texas Court of Criminal Appeals was presented with an opportunity to determine the validity of article 35.16(b)(1) in light of that decision. Noting that a venireman's "conscientious scruples" against the death penalty had always been sufficient reason to challenge for cause, the court upheld the statute.⁴³ The key distinction relied upon by the court to distinguish the Texas statute from the *Witherspoon* test, was that article 35.16(b)(1), as applied, did not *disqualify* a scrupled juror from sitting in a capital case, it merely allowed the prosecution to challenge the venireman for cause.⁴⁴ Although the court remanded this case for a new trial, the court's interpretation of the statute effectively ignored the policy and purposes for the rule in *Witherspoon* and maintained the status quo in Texas jury selection procedure.⁴⁵

Because the Supreme Court had failed to distinguish between a disqualification and a challenge for cause when veniremen are excluded on the basis of conscientious scruples, the states were left an avenue for circumvention of the *Witherspoon* mandate. The critical element in the *Witherspoon* test is that the final jury composition must be one which would ensure an impartial consideration of whether the death sentence should be imposed on a defendant.⁴⁶ Thus, under the *Witherspoon* test, it is necessary to determine the *degree* of objection the venireman holds in regard to the imposition of the death penalty before he or she may be excluded.⁴⁷ The question the Texas court failed to address was whether

42. In 1971 alone, the Supreme Court overturned at least five death sentences that had been affirmed by the Texas Court of Criminal Appeals. See *Whan v. Texas*, 403 U.S. 946 (1971), *rev'g*, 438 S.W.2d 918 (Tex. Crim. App. 1969); *Crain v. Beto*, 403 U.S. 947 (1971), *rev'g*, *Crain v. State*, 394 S.W.2d 165 (Tex. Crim. App. 1965); *Harris v. Texas*, 403 U.S. 947 (1971), *rev'g*, 457 S.W.2d 903 (Tex. Crim. App. 1970); *Quintana v. Texas*, 403 U.S. 947 (1971), *rev'g*, 441 S.W.2d 191 (Tex. Crim. App. 1969); *Turner v. Texas*, 403 U.S. 947 (1971), *rev'g*, 462 S.W.2d 9 (Tex. Crim. App. 1970). For a review of other jurisdictions whose death penalty statutes suffer from the same constitutional deficiencies, see *Tezeno v. State*, 484 S.W.2d 374, 383 n.4 (Tex. Crim. App. 1972).

43. *Ellison v. State*, 432 S.W.2d 955, 956 (Tex. Crim. App. 1968). The death sentence in *Ellison* had been affirmed by the Texas Court of Criminal Appeals in 1967, and was later vacated and remanded by the Supreme Court in light of *Witherspoon*. *Ellison v. Texas*, 392 U.S. 649 (1968), *vacating and remanding*, 419 S.W.2d 849 (Tex. Crim. App. 1967). The hearing on remand was the first opportunity for the Texas Court of Criminal Appeals to determine the validity of article 35.16(b)(1) under the *Witherspoon* principle. See *Ellison v. State*, 432 S.W.2d 955, 956 (Tex. Crim. App. 1968).

44. *Ellison v. State*, 432 S.W.2d 955, 956 (Tex. Crim. App. 1968) (challenge predicated on "bias and prejudice").

45. *Id.* at 956. The court merely referred to its original opinion affirming the conviction before the United States Supreme Court vacated the death sentence in *Furman*.

46. See *Witherspoon v. Illinois*, 391 U.S. 510, 518-19 (1968).

47. See *id.* at 520. The Court expressed the general policy considerations of its decision: [W]hen it swept from the jury all who expressed conscientious or religious scruples

article 35.16(b)(1) allowed veniremen with only general objections to the death penalty to be excluded.

In *Spencer v. Beto*⁴⁸ the Fifth Circuit overturned a Texas death sentence because the *Witherspoon* principle had been violated. Although the appellate court discussed the Texas statute, it did not hold it unconstitutional; instead, the court emphasized the importance of the two-prong test of *Witherspoon* and the degree of opposition necessary before a juror may be excluded.⁴⁹ Conceding that the jurors excused in *Spencer* may have had "very strong scruples" against the death penalty, the court of appeals held that this response did not satisfy the "automatic" vote against capital punishment necessary to justify their exclusion under *Witherspoon*.⁵⁰

Shortly after the Fifth Circuit decision in *Spencer*, the Texas Court of Criminal Appeals again justified article 35.16(b)(1) by focusing on "traditional Texas practice."⁵¹ The court observed in *Pittman v. State*⁵² that it was "traditional Texas practice" to determine whether a prospective juror "could never vote for" capital punishment before he or she could be challenged.⁵³ By so doing, the court disregarded the language of the statute and accentuated the role of both counsel during the jury selection process. The court reasoned that neither the prosecution nor the defense would be willing to accept a juror less than fully qualified under *Witherspoon*, because to do so would provide opposing counsel a "windfall."⁵⁴ The Texas Court of Criminal Appeals believed this factor afforded capital defendants the necessary *Witherspoon* safeguards and thereby circumvented any consideration of the statute.⁵⁵ The court refused to hold that article 35.16(b)(1) fell short of the *Witherspoon* requirements. Instead, the court cast the responsibility for compliance with *Witherspoon* on the trial court and counsel, yet offered no guidance for meeting those responsibilities.⁵⁶

The inconsistencies in the position taken by the Texas Court of Criminal Appeals are illustrated by the procedure employed in upholding the death sentence in *Pittman*. The Texas court distinguished that case from

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 520-21.

48. 398 F.2d 500 (5th Cir. 1968).

49. *See id.* at 501.

50. *Id.* at 402. The same standard was applied in at least two other cases. *See Irving v. Breazeale*, 400 F.2d 231, 236 (5th Cir. 1968); *Williams v. Dutton*, 400 F.2d 797, 804-05 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105 (1969).

51. *See Pittman v. State*, 434 S.W.2d 352, 356-57 (Tex. Crim. App. 1968).

52. 434 S.W.2d 352 (Tex. Crim. App. 1968).

53. *Id.* at 356-57.

54. *Id.* at 356.

55. *See id.* at 356-57.

56. *See id.* at 356.

Witherspoon, asserting that there was no effort in *Pittman* to sweep all scrupled veniremen from the jury panel without determining whether they would be "compelled" to vote against the death penalty.⁵⁷ While noting that 42 of 126 prospective jurors were excused because of their conscientious scruples, the court felt that all but possibly three excusals fell within the standard of *Witherspoon*.⁵⁸ In upholding these exclusions, the court relied on the recognized discretion of the trial judge in excusing jurors when their answers are equivocal or qualified.⁵⁹ This discretion, however, was never mentioned as a consideration when the Supreme Court announced its two-prong test in *Witherspoon*.⁶⁰ It is evident that the Texas Court of Criminal Appeals viewed the impact of *Witherspoon* on "Texas practice" as minimal.⁶¹

57. *Id.* at 356.

58. *Id.* at 356-57. The court did not discuss voir dire examination of these jurors in its opinion, except to note that one additional juror was justifiably excluded because he would not vote for the death penalty in the case of a teenaged defendant. *Id.* at 356 n.4. Another of the jurors, whom the court found constitutionally within the *Witherspoon* rule was examined as follows:

Q. [D]o you feel that you could vote for the death penalty or do you feel that you would have conscientious scruples against the giving of the death penalty . . . ?

A. I don't believe in the death penalty.

Q. You don't believe in the death penalty?

A. I don't *think* so. (Emphasis added).

[After the prosecution had challenged this juror for cause, she was questioned by counsel for defendant:]

Q. Could you imagine of any case so heinous . . . that you could vote for the death penalty if you were taken as a juror?

A. Well, I don't believe in it but I might be convinced on it

Q. If the evidence were strong enough to satisfy you . . . could you vote for the death penalty?

A. Well, I really, I probably would be, I probably would after not believing in it.

23 Sw. L.J. 405, 408 n.19 (1969) (quoting Brief for Amicus Curiae at Appendix, *Pittman v. State*, 434 S.W.2d 352 (Tex. Crim. App. 1968)). It appears that this prospective juror would not have "automatically" voted against the death penalty in *all* cases and was, therefore, excused in violation of *Witherspoon*.

59. *Pittman v. State*, 434 S.W.2d 352, 357 (1968).

60. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The tone of *Witherspoon's* trial was set by the trial judge who, exercising his discretion, stated his desire to "get these conscientious objectors out of the way, without wasting any time on them." *Id.* at 514.

61. *Pittman v. State*, 434 S.W.2d 352, 357 (Tex. Crim. App. 1968). The court stated that where there is doubt whether a prospective juror held conscientious scruples against the death penalty, the prosecution's challenge for cause would be upheld on appeal. In this case the court emphasized the fact that defense counsel made no further request to interrogate excluded veniremen and refused to accept two additional peremptory challenges offered by the trial judge, as mitigating the possible improper exclusion of veniremen. *Id.* at 357. The court placed the burden on defense counsel to protect his client's constitutional rights. See *id.* at 357. The court did recommend, however, that in the future a record be kept of the voir dire examination in order to preserve for appellate review the jury selection proceedings. *Id.* at 357-58. See also *Wilhelm v. State*, 426 S.W.2d 850, 854 (Tex. Crim. App. 1968) (no error presented for review where voir dire examination not brought forward in record).

The Texas court made "unmistakably clear" that it was going to apply state, not federal, standards in determining whether jury selection proceedings in capital cases met the dictates of justice.⁶² When Pittman moved for rehearing, his attorney contended that the *Witherspoon* standard must be met in the examination of every prospective juror.⁶³ The court of criminal appeals rejected this as a "drastic standard,"⁶⁴ and asserted that *Witherspoon* need only be strictly complied with when a juror whom the defendant has seriously tried to qualify has been excused.⁶⁵ By so doing, the court inverted the duty of the prosecution to disqualify a venireman under *Witherspoon* and placed the duty to qualify a prospective juror squarely on the defendant.⁶⁶ This position is totally inconsistent with the mandate of *Witherspoon*.⁶⁷

In *Marion v. Beto*⁶⁸ the Fifth Circuit noted a sharp contrast between the language of *Witherspoon* and that of the Texas Court of Criminal Appeals in *Pittman*.⁶⁹ Taking into consideration the degree of discretion a jury is granted in deciding whether or not to impose the death penalty, together with the irrevocable and grave nature of the punishment, the court decided that the improper exclusion of even one juror would prejudice the defendant's rights.⁷⁰ The circuit court emphasized that since a properly empaneled jury could still vote to impose the death penalty, it would only be

62. See *Pittman v. State*, 434 S.W.2d 352, 356 (Tex. Crim. App. 1968).

63. *Id.* at 361.

64. *Id.* at 361.

65. *Id.* at 362. See also *Grider v. State*, 468 S.W.2d 393, 398 (Tex. Crim. App. 1971) (consideration of proceeding's atmosphere required).

66. See *Pittman v. State*, 434 S.W.2d 352, 362 (Tex. Crim. App. 1968).

67. See *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968). In regard to state statutes the *Witherspoon* majority held: "If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis . . . the death sentence cannot be carried out even if applicable . . . case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion." *Id.* at 522 n.21 (emphasis added). See *Scott v. State*, 434 S.W.2d 678 (Tex. Crim. App. 1968), *cert. denied*, 395 U.S. 925 (1969). In affirming the conviction and death sentence of the defendant, the court recognized that one or more veniremen "may have been" excused in violation of *Witherspoon*. The court held, however, that the exclusion of those jurors did not "stack the deck" against the defendant, as defense counsel had not examined the jurors further to determine whether they qualified. The court assumed that defense counsel did not want the jurors, and therefore the *Witherspoon* test had been satisfied. *Id.* at 683. See also *Harris v. State*, 457 S.W.2d 903 (Tex. Crim. App. 1970), *rev'd*, 403 U.S. 947 (1971). The Texas court held in *Harris* that even though certain jurors may have been improperly excused, the prosecution had not crossed the "line of neutrality." The court looked to the entire atmosphere of the proceedings rather than simply the voir dire examination of the prospective jurors in order to determine whether there was a violation of *Witherspoon*. *Id.* at 909 & n.3.

68. 434 F.2d 29 (5th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971).

69. *Id.* at 31-32.

70. *Id.* at 32. The court stated: "Where . . . unanimity of decision is required to impose the death sentence, the stark reality is that one improperly excluded juror may mean the difference between life and death for a defendant." *Id.* at 32 (emphasis added).

equitable to protect the defendant's rights from the "vast difference in treatment" which could result if even a single venireman were improperly excluded.⁷¹ Thus, the position taken by the Fifth Circuit was in opposition to the holdings of the Texas court.⁷²

Subsequent to the Fifth Circuit decision in *Marion*, the Supreme Court reversed a number of Texas death sentences on *Witherspoon* grounds in memorandum opinions.⁷³ *Tezeno v. State*⁷⁴ presented the Texas Court of Criminal Appeals with an opportunity to bring its position into conformity with the dictates of the Supreme Court. The Texas court, however, maintained the view that *Witherspoon* was not to be given a "hypertechnical" application⁷⁵ and criticized the Supreme Court for failing to provide the necessary guidance in this area. The Texas court upheld the death sentence in *Tezeno* despite the ambiguous responses of two prospective jurors on voir dire examination.⁷⁶ The court reasoned that these answers were "more unequivocal" than those in the reversals.⁷⁷ The Supreme Court never had the opportunity to examine this line of reasoning, however, as the sentence was commuted following the Court's declaration that the death penalty, as then imposed, was unconstitutional.⁷⁸

There are a number of policy considerations for the staunch position of the Texas courts in their unwillingness to reverse convictions under

71. *Id.* at 32.

72. *Cf. Huffman v. State*, 450 S.W.2d 858, 860 (Tex. Crim. App. 1970) (where prosecution exercised only 7 of its 15 peremptory challenges, exclusion of jurors in violation of *Witherspoon* held not reversible error); *Scott v. State*, 434 S.W.2d 678, 683 (Tex. Crim. App. 1968) (where prosecution had not exhausted its peremptory challenges, held not reversible error), *cert. denied*, 395 U.S. 925 (1969); *Whan v. State*, 438 S.W.2d 918, 920 (Tex. Crim. App. 1969) (where prosecution exercised only 1 of 15 peremptory challenges, held not reversible error), *rev'd*, 403 U.S. 946 (1971).

73. Cases cited note 46 *supra*. Judge Onion of the Texas Court of Criminal Appeal voiced the frustration of the court at the number of reversals the criminal justice system had suffered due to *Witherspoon*. He emphasized that the memorandum decision of the Supreme Court had failed to furnish guidelines that the state courts could follow in selecting juries in capital cases. In view of the reversals, however, he reconsidered the majority holding in *Tezeno* and concluded that the jurors had been, in fact, improperly excluded. *Tezeno v. State*, 484 S.W.2d 374, 385-86. (Tex. Crim. App. 1972) (dissenting to opinion following commutation of sentence).

74. 484 S.W.2d 374 (Tex. Crim. App. 1972).

75. *Id.* at 383. The court quoted *Ashe v. Swenson*, 397 U.S. 436, 444 (1970), contending that *Witherspoon* must not be applied "with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Tezeno v. State*, 484 S.W.2d 374, 383 (Tex. Crim. App. 1972).

76. *See Tezeno v. State*, 484 S.W.2d 374, 380-85 (Tex. Crim. App. 1972) (dissenting to opinion following commutation of sentence).

77. *Id.* at 383-89. One prospective juror had contradicted himself during the voir dire examination. Another, when asked whether she knew of any facts or circumstances that would justify her voting to render a verdict of death, answered, "I don't believe I could." *Id.* at 381.

78. *See id.* at 385 (opinion following commutation of sentence). *See also Furman v. Georgia*, 408 U.S. 238, 256-57 (1972).

Witherspoon. One influential factor may have been the heinous crimes for which capital defendants were convicted.⁷⁹ There is also a procedural complication deriving from the bifurcated trial system in Texas.⁸⁰ If a death sentence is overturned by the Texas Court of Criminal Appeals or the Supreme Court, the only disposition that the court of criminal appeals is authorized to make is to remand the entire case for a new trial.⁸¹ These factors provide an impetus for the Texas court to uphold the judgments if at all possible. Such considerations seem insubstantial, however, when a man's life hangs in the balance.

Post-Jurek Equivocation

The new Texas Penal Code became effective on January 1, 1974.⁸² The Code includes a statutory scheme for the imposition of the death penalty, designed to conform to the mandates enunciated by the Supreme Court in *Furman v. Georgia*.⁸³ The Court in *Furman* condemned capital punishment as then imposed because the degree of jury discretion allowed by the prevailing state statutes led to an arbitrary and capricious infliction of that penalty.⁸⁴ Four years later, however, the Supreme Court approved the amended Texas death penalty procedure in *Jurek v. Texas*.⁸⁵ The Court found that the Texas procedure eliminated the *Furman* objections to the death penalty by narrowing the category of capital murder and providing the sentencing jury with the guidance necessary to perform its task in a rational and consistent manner.⁸⁶

79. The following examples are illustrative of the capital crimes that were before the court on *Witherspoon* grounds. In *Harris v. State*, the defendant was charged with the murder of his mother and her friend. Both women had their throats slit. 457 S.W.2d 903 (Tex. Crim. App. 1970), *rev'd*, 403 U.S. 947 (1971). Another defendant and a friend called a taxicab and forced the driver to drive to a deserted road. They ordered him to disrobe, robbed and shot him to death. *Whan v. State*, 438 S.W.2d 918 (Tex. Crim. App. 1969), *rev'd*, 403 U.S. 946 (1971). The defendant in *Scott v. State*, 434 S.W.2d 678 (Tex. Crim. App. 1968), *cert. denied*, 395 U.S. 925 (1969), was convicted of raping his 20 year old victim five times. The victim was also raped six times by co-principals in the defendant's presence.

80. The Texas Code of Criminal Procedure provides for a separate trial for guilt and punishment before the same jury. The judgment cannot be complete until the jury has rendered a verdict on both guilt and punishment. TEX. CODE CRIM. PROC. ANN. art. 37.07 (Supp. 1976-1977).

81. *Ellison v. State*, 432 S.W.2d 955, 957 (Tex. Crim. App. 1968); *see Sellars v. Estelle*, 400 F. Supp. 854, 858 (S.D. Tex. 1975); *Grider v. State*, 468 S.W.2d 393, 400 (Tex. Crim. App. 1971); TEX. CODE CRIM. PROC. ANN. art. 44.24 (Supp. 1976-1977). *See also Stanley v. State*, 490 S.W.2d 828, 831 (Tex. Crim. App. 1972) (dissenting opinion); *Whan v. State*, 485 S.W.2d 275, 277-81 (Tex. Crim. App. 1972) (dissenting opinion).

82. *See Tex. Laws 1973, ch. 399, § 4, at 995.*

83. 408 U.S. 238 (1972).

84. *Id.* at 274 (Brennan, J., concurring).

85. ___ U.S. ___, ___, 96 S. Ct. 2950, 2958, 49 L. Ed. 2d 929, 941 (1976); *see Tex. CODE CRIM. PROC. ANN. art. 37.071* (Supp. 1976-77).

86. *Jurek v. Texas*, ___ U.S. ___, ___, 96 S. Ct. 2950, 2958, 49 L. Ed. 2d 929, 941 (1976).

Concurrent with the restoration of the death penalty, came the revival of the *Witherspoon* test. In an effort to adapt Texas jury selection procedures to *Witherspoon* and the new death penalty statutes, section 12.31(b) was included in the penal code revision.⁸⁷ This section provides that all jurors in capital cases be informed of the penalties that could be imposed upon conviction.⁸⁸ The code further provides that a juror may be disqualified unless he states *under oath* that the imposition of the death penalty will not affect his or her decision on any issue of fact.⁸⁹ The tangible effect of this statute is that it enabled the court of criminal appeals to avoid the *Witherspoon* test altogether.⁹⁰

The first and the most baffling of the post-*Jurek* cases is *Hovila v. State*.⁹¹ Defense counsel filed a motion in limine to limit inquiry into the prospective jurors' feelings about capital punishment, and the motion was granted.⁹² Consequently, the trial judge conducted only a cursory examination of the venire panel, and a number of prospective jurors were excused after expressing a general objection to the death penalty.⁹³ On appeal the appellant complained that the standards of *Witherspoon* had been violated; the court of criminal appeals sustained this contention and reversed the conviction.⁹⁴ This decision departed from the previous Texas position which held defense counsel responsible for protecting the defendant's rights under the *Witherspoon* doctrine.⁹⁵ The motion filed by defense counsel in this case was tantamount to a specific waiver of the defendant's *Witherspoon* rights, yet the court of criminal appeals allowed the defendant's conviction to be reversed.

87. TEX. PENAL CODE ANN. § 12.31(b) (1974). See also Crump, *Capital Murder: The Issues in Texas*, 14 HOUS. L. REV. 531, 541-46 (1977).

88. TEX. PENAL CODE ANN. § 12.31(b) (1974). The exact provision is:

(b) 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.

Id.

89. *Id.*

90. See *Burns v. State*, No. 50,576, slip op. at 6-7 (Tex. Crim. App. May 3, 1977); *Shippy v. State*, No. 53,831, slip op. at 5 (Tex. Crim. App. April 27, 1977); *Whitmore v. State*, No. 52,325, slip op. at 5-6 (Tex. Crim. App. Oct. 13, 1976); *Moore v. State*, 542 S.W.2d 664, 672 (Tex. Crim. App. 1976).

91. 532 S.W.2d 293 (Tex. Crim. App. 1975).

92. *Id.* at 300 (Motion for Rehearing) (dissenting opinion) (defendant's unusual request not mentioned in the majority opinion).

93. *Id.* at 295. Representative of the juror's responses were the following: "I can't—I don't believe in the death penalty, I feel I'm disqualified"; "With a clear conscience I could not make a decision of that magnitude"; "I'm afraid my conscience wouldn't let me give the death sentence." *Id.* at 295.

94. *Id.* at 294-95.

95. See *Pittman v. State*, 434 S.W.2d 352, 362 (Tex. Crim. App. 1968).

The most plausible explanation for the action of the court in this case is that *Hovila* presented the opportunity for the court to determine whether the *Witherspoon* test was still applicable in Texas in view of the oath required by section 12.31(b). The majority held that the *Witherspoon* rule remained unchanged, reasoning that the jurors' knowledge of the effect of their answers could not help but influence their decision when responding to the statutory questions which will determine whether the death penalty will be assessed.⁹⁶ This influence is not alleviated even though under this new procedure the sentence is actually assessed by the trial judge.⁹⁷ In *Smith v. State*⁹⁸ the court went further and determined the section 12.31(b) oath to be but one criterion in the qualification of each prospective juror.⁹⁹ In the wake of these decisions, the Texas court appeared to be willing to follow the dictates of *Witherspoon*.

After the decision in *Hovila*, the court of criminal appeals began to relax its standards in determining whether a prospective juror's answer met the *Witherspoon* test.¹⁰⁰ In *Boulware v. State*¹⁰¹ the court held that a failure to object to the improper exclusion of a juror waives the right to raise that issue on appeal.¹⁰² The court, therefore, recanted the position it took in *Hovila* and instead relied on recent Supreme Court decisions which held that certain constitutional rights may be waived by a failure to assert those rights.¹⁰³ The Texas court distinguished the Fifth Circuit decision in *Marion v. Beto*,¹⁰⁴ noting that Marion's original trial took place before the

96. *Hovila v. State*, 532 S.W.2d 293, 294 (Tex. Crim. App. 1975); see TEX. CODE CRIM. PROC. ANN. art. 37.071 (Supp. 1976-1977).

97. *Id.* at 294. See also TEX. CODE CRIM. PROC. ANN. art. 37.071 (Supp. 1976-1977); TEX. PENAL CODE ANN. § 12.31(b) (1974).

98. 540 S.W.2d 693 (Tex. Crim. App. 1976).

99. *Id.* at 698.

100. See *Woodkins v. State*, 542 S.W.2d 855, 862 (Tex. Crim. App. 1976) (veniremen excluded without further examination after stating that death penalty would affect his deliberation); *White v. State*, 543 S.W.2d 104, 107 (Tex. Crim. App. 1976) (responses of "I don't think so," and "I am not sure" warranted exclusion); *Smith v. State*, 540 S.W.2d 693, 698 n.7 (Tex. Crim. App. 1976) (juror excused who responded "[d]eath is something that I would not be able to condemn anybody to.").

101. 542 S.W.2d 677 (Tex. Crim. App. 1976), noted in 55 TEX. L. REV. 129 (1977).

102. *Id.* at 682-83. This position might not stand in light of the later Supreme Court decision in *Davis v. Georgia*, ___ U.S. ___, ___, 97 S. Ct. 399, 50 L. Ed. 2d 339 (1976) (per curiam), which held that if even one prospective juror was excluded improperly, the death sentence could not be upheld. *Id.* at ___, 97 S. Ct. at 400, 50 L. Ed. 2d at 341. See also *Marion v. Beto*, 434 F.2d 29, 31-32 (5th Cir. 1970), cert. denied, 402 U.S. 906 (1971). The mandate of the Court may be such as would preclude this kind of error from being waived. See *Shippy v. State*, No. 53,831, slip op. at 12-14 (Tex. Crim. App. April 27, 1977) (dissenting opinion).

103. *Estelle v. Williams*, ___ U.S. ___, ___, 96 S. Ct. 1691, 1696-97, 48 L. Ed. 2d 126, 135 (1976) (defendant's failure to object to trial before a jury in prison garb); *Francis v. Henderson*, ___ U.S. ___, ___, 96 S. Ct. 1708, 1711, 48 L. Ed. 2d 149, 154-55 (1976) (defendant's failure to timely object to composition of grand jury that indicted him).

104. 434 F.2d 29 (5th Cir. 1970), cert. denied, 402 U.S. 906 (1971).

Witherspoon decision was rendered.¹⁰⁵ Under these circumstances, the court reasoned, a defendant could not be required to assert a right that was not then available.¹⁰⁶ In *Boulware*, however, the right was established and the defendant failed to claim it, therefore, the court held he was precluded from raising the matter on appeal.¹⁰⁷

It seems that the court of criminal appeals has reverted to its pre-*Jurek* position and again contravened the purpose of the *Witherspoon* rule.¹⁰⁸ The court of criminal appeals acknowledged that the new procedure for the imposition of the death penalty does not eliminate the effect of a juror's opinion when answering the statutory questions required.¹⁰⁹ They, however, have avoided the mandate of *Witherspoon*, which requires the court to ascertain the degree of opposition a juror holds against the death penalty, by improperly placing that burden on the defendant.¹¹⁰ The Texas court disregards the effect of its position on Texas capital defendants who, as a result, could be condemned to trial by a death prone jury.¹¹¹

Section 12.31(b): An "Exclusive" Oath

A complete departure from the *Witherspoon* standard resulted when the Texas Court of Criminal Appeals decided *Moore v. State*.¹¹² In reconsidering the role of the oath required by section 12.31(b), the court ruled that *Witherspoon* considerations were unnecessary when a prospective juror expressed a "strong opposition" to capital punishment which rendered him unable to take the oath.¹¹³ The court did not elaborate in its reasoning in arriving at the decision, but stated simply that section 12.31(b) eliminated any obligation to discuss the *Witherspoon* issue.¹¹⁴ The oath, which at first reading may seem consistent, actually provides a broader basis for exclusion than the *Witherspoon* test by disqualifying any prospective juror whose deliberation on any issue of fact would be affected in any way by

105. *Boulware v. State*, 542 S.W.2d 677, 681 (Tex. Crim. App. 1976).

106. *Id.* at 681.

107. *Id.* at 681-83.

108. Compare *Boulware v. State*, 542 S.W.2d 677, 681 (Tex. Crim. App. 1976) with *Pittman v. State*, 434 S.W.2d 352, 356-57 (Tex. Crim. App. 1968).

109. *Hovila v. State*, 532 S.W.2d 293, 294 (Tex. Crim. App. 1975).

110. See *Boulware v. State*, 542 S.W.2d 677, 681-83 (Tex. Crim. App. 1976); *Pittman v. State*, 434 S.W.2d 352, 362 (Tex. Crim. App. 1968).

111. Compare *Boulware v. State*, 542 S.W.2d 677, 681-83 (Tex. Crim. App. 1976) and *Pittman v. State*, 434 S.W.2d 352, 356-57 (Tex. Crim. App. 1968) with *Witherspoon v. Illinois*, 391 U.S. 510, 520-21 (1968) and *Marion v. Beto*, 434 F.2d 29, 31-32 (5th Cir. 1970).

112. 542 S.W.2d 664 (Tex. Crim. App. 1976).

113. *Id.* at 672.

114. *Id.* at 672. The court went further in *Whitmore v State*, No. 52,325, slip op. at 6 (Tex. Crim. App. Oct. 13, 1976) and stated that as long as a juror is disqualified under section 12.31(b), "it is of no consequence" that the juror qualifies under *Witherspoon*. *Id.* slip op. at 6. See also *Woodkins v. State*, 542 S.W.2d 855, 862 (Tex. Crim. App. 1976).

the imposition of the death penalty.¹¹⁵ This standard is reminiscent of that imposed by the Illinois statute struck down in *Witherspoon*.¹¹⁶ The new Texas position was expanded in *Whitmore v. State*,¹¹⁷ where it was conceded that the juror in question *qualified* under *Witherspoon*.¹¹⁸ The court held that as long as the venireman was *disqualified* under section 12.31(b), it was of no consequence that the same juror qualified under *Witherspoon*.¹¹⁹ These decisions are in direct conflict, not only with the mandate of *Witherspoon*, but also with the more recent Supreme Court decision of *Davis v. Georgia*.¹²⁰

In *Davis* the Georgia Supreme Court affirmed a death sentence in spite of the fact that one prospective juror had been excused in violation of *Witherspoon*.¹²¹ The Georgia court reasoned that the defendant had not been denied a jury representing a cross-section of the community, in view of the fact that other jurors who had some objections to the death penalty had not been excluded.¹²² The United States Supreme Court ruled that this decision could not stand under the *Witherspoon* test,¹²³ which holds that a prospective juror can only be excluded when he will not, under any circumstances, vote to inflict the death penalty.¹²⁴ According to *Davis*, a death sentence could not stand if even one venireman were excluded in violation of this standard.¹²⁵ The Court's decision in *Davis* recognized, in effect, the Fifth Circuit's position that because of the severity of the death penalty and the role a juror's attitude plays in imposing that penalty, the improper exclusion of even one prospective juror could mean the difference between

115. See TEX. PENAL CODE ANN. § 12.31(b) (1974). Compare *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968) with *Moore v. State*, 542 S.W.2d 664, 672 (Tex. Crim. App. 1976) and *Smith v. State*, 540 S.W.2d 693, 698 (Tex. Crim. App. 1976) and *Hovila v. State*, 532 S.W.2d 293, 295 (Tex. Crim. App. 1975).

116. *Witherspoon v. Illinois*, 391 U.S. 510, 523 (1968). The *Witherspoon* rule only allows the exclusion of those veniremen who are "irrevocably committed" to vote against the death penalty, regardless of the evidence. *Id.* at 522 n.21. The Illinois statute allowed any veniremen who held conscientious scruples against capital punishment to be excluded. ILL. REV. STAT. ch. 38, § 743 (1959) (repealed 1964). Section 12.31(b) disqualifies any prospective juror who cannot take an oath stating that the possible imposition of the death penalty "will not affect his deliberations on any issue of fact." TEX. PENAL CODE ANN. § 12.31(b) (1974).

117. No. 52,325 (Tex. Crim. App. Oct. 13, 1976).

118. *Id.* slip op. at 6.

119. *Id.* slip op. at 6.

120. ___ U.S. ___, ___, 97 S. Ct. 399, 400, 50 L. Ed. 2d 339, 341 (1976).

121. *Davis v. State*, 225 S.E.2d 241, 244-45 (Ga.), *rev'd*, ___ U.S. ___, ___, 97 S. Ct. 399, 400, 50 L. Ed. 2d 339, 341 (1976).

122. *Davis v. State*, 225 S.E.2d 241, 244 (Ga.), *rev'd*, ___ U.S. ___, ___, 97 S. Ct. 399, 400, 50 L. Ed. 2d 339, 341 (1976).

123. *Davis v. Georgia*, ___ U.S. ___, ___, 97 S. Ct. 399, 400, 50 L. Ed. 2d 339, 341 (1976).

124. *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968).

125. *Davis v. Georgia*, ___ U.S. ___, ___, 97 S. Ct. 399, 400, 50 L. Ed. 2d 339, 341 (1976); see *Marion v. Beto*, 434 F.2d 29, 31 (5th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971).

life and death for a capital defendant.¹²⁶

Since the *Witherspoon* decision was rendered, the Texas court has experienced much difficulty in applying the standards promulgated in that case.¹²⁷ Even after the Supreme Court decision in *Davis*, the Texas Court of Criminal Appeals adhered to its previous interpretation of section 12.31(b).¹²⁸ Section 12.31(b) presented the court with an opportunity to avoid *Witherspoon's* application and provided justification for the decision to follow its own interpretation of what constitutes an equitable jury selection process. This intransigence in addressing the policy of *Witherspoon* has been evidenced by the court's summary dismissal of the constitutional contention whenever it has been asserted.¹²⁹

This conflict has not been overlooked completely, however. The constitutionality of section 12.31(b) was questioned by the strong dissent in *Shippy v. State*.¹³⁰ There it was indicated that the affectation which would disqualify a venireman under section 12.31(b) may not meet the *Witherspoon* requirement of an unambiguous and irrevocable commitment to vote against the death penalty.¹³¹ The Court in *Witherspoon* specifically condemned any state law that supports a "broader basis . . . for exclusion."¹³² Although not clear from the face of the statute, the prevailing interpretation by the court of criminal appeals would seem to carry section 12.31(b) onto this "broader basis."¹³³

The unsettled state of the law regarding jury selection procedure in Texas was illustrated in two distinct cases.¹³⁴ The defendant in *Burns v.*

126. *Davis v. Georgia*, ___ U.S. ___, ___, 97 S. Ct. 399, 400, 50 L. Ed. 2d 339, 341 (1976); see *Marion v. Beto*, 434 F.2d 29, 31 (5th Cir. 1970), cert. denied, 402 U.S. 906 (1971).

127. See *Tezeno v. State*, 484 S.W.2d 374, 383-84 (Tex. Crim. App. 1972) (listing a number of Texas convictions reversed on *Witherspoon* grounds).

128. *Burns v. State*, No. 50,576, slip op. at 6-7 (Tex. Crim. App. May 3, 1977); *Shippy v. State*, No. 53,831, slip op. at 5 (Tex. Crim. App. April 27, 1977); *Whitmore v. State*, No. 52,325, slip op. at 5-6 (Tex. Crim. App. Oct. 13, 1976).

129. See *Burns v. State*, No. 50,576, slip op. at 6-7 (Tex. Crim. App. May 3, 1977); *Shippy v. State*, No. 53,831, slip op. at 5 (Tex. Crim. App. April 27, 1977); *Whitmore v. State*, No. 52,325, slip op. at 5-6 (Tex. Crim. App. Oct. 31, 1976); *Moore v. State*, 542 S.W.2d 664, 672 (Tex. Crim. App. 1976).

130. No. 53,831 (Tex. Crim. App. April 27, 1977) (dissenting opinion).

131. *Id.* slip op. at 11 (dissenting opinion). Judge Truman Roberts observed:

It is readily apparent that a person who generally objects to the death penalty because of conscientious and religious scruples against its infliction will have his determination of fact affected by such belief. But if such "affectation" does not amount to an unambiguous and irrevocable commitment to vote against the death penalty in all cases, such individual cannot be constitutionally challenged for cause under *Witherspoon*.

Id. slip op. at 11.

132. *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968).

133. See *Shippy v. State*, No. 53,831, slip op. at 11-12 (Tex. Crim. App. April 27, 1977) (dissenting opinion); *Burns v. State*, No. 50,576, slip op. at 1 (Tex. Crim. App. May 3, 1977) (dissenting opinion).

134. *Brock v. State*, No. 53,108 (Tex. Crim. App. June 14, 1977); *Burns v. State*, No. 50,576 (Tex. Crim. App. May 3, 1977).

*State*¹³⁵ made a sweeping attack on virtually every aspect of jury selection under *Witherspoon*, and was denied relief on each issue.¹³⁶ The court of criminal appeals summarily dismissed the allegation of conflict with *Witherspoon* by reaffirming its previous position.¹³⁷ The court found no reversible error in the trial court's refusal to grant defense counsel's request to further examine two prospective jurors because, among other reasons, the prosecution had exercised only thirteen of its fifteen peremptory challenges.¹³⁸ Defense counsel made the same request regarding a third venireman, whereupon the court and the prosecution asked the venireman several more questions. After this colloquy the prospective juror was successfully challenged for cause and defense counsel objected.¹³⁹ The court of criminal appeals found that despite these actions on the part of defense counsel, he did not sufficiently attempt to qualify these jurors so that their exclusion would constitute reversible error on *Witherspoon* grounds.¹⁴⁰ The court also found such responses as "[t]hat is what I believe," and "[v]ery likely," sufficient affectation to disqualify the veniremen under section 12.31(b).¹⁴¹

The court in *Burns* reverted to pre-*Furman* standards for excusing jurors, again placing the burden on the defendant to strongly assert those rights or risk losing them on appeal.¹⁴² The court ruled that the responses of the veniremen in this case disqualified them under section 12.31(b), thus, application of the *Witherspoon* test became altogether unnecessary.¹⁴³ Responses similar to these have been held by the Supreme Court to specifically violate the *Witherspoon* standard.¹⁴⁴

The inconsistencies in the Texas position are most clearly reflected by the court's decision in *Brock v. State*.¹⁴⁵ In that case the jurors had been excused in accordance with the *Witherspoon* test but had not been disqualified under section 12.31(b).¹⁴⁶ The court of criminal appeals held that a venireman may be disqualified under either *Witherspoon* or section

135. No. 50,576 (Tex. Crim. App. May 3, 1977).

136. *Id.* slip op. at 4-14.

137. *Id.* slip op. at 6-7.

138. *Id.* slip op. at 10.

139. *Id.* slip op. at 9-10.

140. *Id.* slip op. at 10; see *Pittman v. State*, 434 S.W.2d 352, 361-62 (Tex. Crim. App. 1968).

141. *Id.* *Burns v. State*, No. 50,576, slip op. at 6-9 (Tex. Crim. App. May 3, 1977).

142. *Burns v. State*, No. 50,576, slip op. at 13 (Tex. Crim. App. May 3, 1977); see *Pittman v. State*, 434 S.W.2d 352, 362 (Tex. Crim. App. 1968).

143. *Burns v. State*, No. 50,576, slip op. at 13 (Tex. Crim. App. May 3, 1977); see *Moore v. State*, 542 S.W.2d 664, 672 (Tex. Crim. App. 1976).

144. *Maxwell v. Bishop*, 398 U.S. 262, 264-65 (1970) (per curiam); *Boulden v. Holman*, 394 U.S. 478, 482-83 & nn.6 & 7 (1969).

145. No. 53,108 (Tex. Crim. App. June 14, 1977).

146. *Id.* slip op. at 4-6.

12.31(b) or both.¹⁴⁷ The court further held that it did not matter which test the venireman was interrogated under first.¹⁴⁸

There are two conflicting inferences which may be drawn from the *Brock* case. First, it may be reasonable to conclude that the *Witherspoon* standard and the section 12.31(b) oath are not the same test. If these tests were the same, the court would not be compelled to have included the words "or both" in its opinion.¹⁴⁹ Second, the fact that it does not matter which test a prospective juror is disqualified under lends support to the belief that both tests are the same, since the mandates of the Supreme Court must be followed by state courts.¹⁵⁰ It seems, therefore, that the present position of the Texas Court of Criminal Appeals is unsettled and the test to be used in jury selection is left totally to the discretion of the trial judge and the prosecutor.¹⁵¹ The fact that one test may provide a broader basis for exclusion than the other has not been considered by the court.

CONCLUSION

An impartial jury is constitutionally guaranteed to every defendant by the sixth amendment.¹⁵² The purpose of *Witherspoon v. Illinois*¹⁵³ is to preserve that impartiality in capital cases.¹⁵⁴ Although capital punishment, as presently imposed in Texas, is compatible with the constitutional prohibitions of the eighth amendment,¹⁵⁵ the present procedure does not eliminate the influence of a juror's attitude toward that penalty when answering the statutory questions that determine whether it will be inflicted.¹⁵⁶ Logically, it would seem that the *Witherspoon* test should continue to apply to jury selection proceedings in Texas.

The Texas Court of Criminal Appeals encountered a dilemma when applying the *Witherspoon* test according to the standards of the United States Supreme Court.¹⁵⁷ Partial responsibility for this dilemma lies in a failure by the Court to provide precise guidelines for the application of the standard; instead *Witherspoon* and subsequent cases can be interpreted as a warning to the states to amend their jury selection proceedings.¹⁵⁸ Section

147. *Id.* slip op. at 6.

148. *Id.* slip op. at 6.

149. *See id.* slip op. at 6.

150. U.S. CONST. art. III § 2; *see Brock v. State*, No. 53,108, slip op. at 6 (Tex. Crim. App. June 14, 1977).

151. *See Brock v. State*, No. 53,108, slip op. at 6 (Tex. Crim. App. June 14, 1977).

152. U.S. CONST. amend. VI.

153. 391 U.S. 510 (1968).

154. *Id.* at 518.

155. *Jurek v. Texas*, ___ U.S. ___, ___, 96 S. Ct. 2950, 2958, 49 L. Ed. 2d 929, 941 (1976).

156. *Hovila v. State*, 532 S.W.2d 293, 294 (Tex. Crim. App. 1975).

157. *See Tezeno v. State*, 484 S.W.2d 374, 383-84 (Tex. Crim. App. 1972).

158. *Witherspoon v. Illinois*, 391 U.S. 510, 539 (1968) (Black, J., dissenting).

12.31(b) of the Texas Penal Code is a provision for the qualification of jurors in capital cases.¹⁵⁹ The Texas Court of Criminal Appeals, however, has interpreted this section to exclude application of the *Witherspoon* test.¹⁶⁰ While the constitutionality of this provision has yet to be discussed by the United States Supreme Court, it appears to be in direct conflict with prior rulings of the Court.¹⁶¹ The judicial interpretation of section 12.31(b) not only inverts the two-prong test, but ignores the intent and purpose of the *Witherspoon* rule by placing the burden on the defense to qualify prospective veniremen. Juries selected pursuant to this section may well be "uncommonly willing to condemn a man to death," and if so, it will be the Texas courts that have "stacked the deck" against the defendant.

159. TEX. PENAL CODE ANN. § 12.31(b) (1974).

160. *Burns v. State*, No. 50,576, slip op. at 6-7 (Tex. Crim. App. May 3, 1977); *Shippy v. State*, No. 53,831, slip op. at 5 (Tex. Crim. App. April 27, 1977); *Whitmore v. State*, No. 52,325, slip op. at 5-6 (Tex. Crim. App. Oct. 13, 1976); *Moore v. State*, 542 S.W.2d 664, 672 (Tex. Crim. App. 1976).

161. See *Davis v. Georgia*, ___ U.S. ___, ___, 97 S. Ct. 399, 400, 50 L. Ed. 2d 339, 341 (1976).