ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1427

TITLE LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA, DEPARTMENT OF CORRECTIONS, Petitioner v. JOHNNY PAUL WITT

PLACE Washington, D. C.

DATE October 2, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA, DEPARTMENT OF CORRECTIONS, Petitioner : No. 83-1427

v. :

JOHNNY PAUL WITT :

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Washington, D.C.

Tuesday, October 2, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 o'clock a.m.

APPEARANCES:

ROBERT J. LANDRY, ESQ., Assistant Attorney General of Florida, Tampa, Florida; on behalf of Petitioner.

WILLIAM C. MC LAIN, ESQ., Assistant Public Defender, Bartow, Florida; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Landry, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT J. LANDRY, ESQ.

ON BEHALF OF THE PETITIONER

MR. LANDRY: Mr. Chief Justice, and may it please the Court, the instant case presents the opportunity for this Court to address and decide for the first time the standard of review which should be made by Federal habeas corpus concerning Witherspoon claims brought by state prisoners in habeas corpus actions.

The decision of the lower court, we believe, is erroneous and must be reversed because it is not mandated by, in our belief, to be consistent with prior Supreme Court decisions.

It fails to accord the appropriate deference to state court determinations of fact, as required by 2254 D. It fails to accord the respect to the federal district court fact-finding obligations of district judges under rule 52, and announces a mechanistic policy which is more conducive to adherence to form rather than substance.

We would ask the Court to provide much-needed clarification to the lower courts in this regard by reiterating that the position of Witherspoon and his

progeny is that a prospective juror may be excused for cause when his capital punishment views are such that he is unable or unwilling to follow along in the court's instruction; that there is no necessary formula to be employed either by the questioner or by the answer given by the prospective juror; that a juror is required to assure the trial judge that he can follow the law or else he will be excused for cause based on his views; and that because of the unique advantage occupied by the trial judge in making the determinations as to what the jury is saying and means, that wide latitude should be given his determinations.

Very briefly, the facts in this case which brought this to a head, Johnny Paul Witt was tried and convicted of the first degree murder of Jonathan Kushner and received a sentence of death.

During the voir dire examination of one of the jurors, Juror Colby, the prosecutor inquired as to whether or not the juror had any particular beliefs against capital punishment. The juror responded that she had some personal views and the prosecutor followed that up with a series of questions:

First: Would that interfere with you sitting as a juror in this case?

ANSWER: I'm afraid it would.

QUESTION: You are afraid it would?

ANSWER: Yes, sir.

QUESTION: Would it interfere with your judging the guilt or innocence of the defendant in this case?

ANSWER: think so.

QUESTION: You think it would?

ANSWER: I think it would.

At this point the prosecutor moved to excuse the juror for cause. The defendant neither objected to the removal nor asked to give any additional clarifying or rehabilitative questions of the juror, and the trial court supported the prosecutor's motion to step down.

We believe that the appropriate test for habeas corpus in reviewing collateral attacks, Witherspoon claims, is the presumption of correctness outlined in 2254 D of section Title 28.

The policy reasons for this include the traditional values of comedy and federalism which have been enunciated in previous proceedings in this Court. Going back to Stone v. Powell, this Court has announced that state judges are fully capable of applying constitutional standards, and they take the same oath to uphold the Constitution as do the federal judges.

It would emphasize the importance of the trial

as a main event in a scheme of the criminal justice system and not just a preliminary round or a trial run for a never-ending cycle of appeals and post-conviction motions. It would develop a concept of finality for litigation. Instead of having successive repetitive review to achieve some never-ending idea that a better result will be achieved, the courts will recognize that successive review merely affords an opportunity for different results.

And, finally, it would be consistent with the prior decisions of this Court which have most recently recognized the importance that should be given to trial judges in making their determinations on matters of fact which they are better equipped to resolve.

Most of these values which I've just enunciated, of course, are most adequately and demonstrated most forcefully in this Court in the recent opinion of Patton v. Young which was decided two or three months ago. In that case the Court was called upon to decide whether or not the trial judge's determination or a federal court's determination as to whether a juror was biased because of pretrial prejudicial publicity, and there had been a disagreement among the state court and the federal courts about that.

And this Court ruled that because of the

greater opportunity of a trial judge to observe the demeanor and credibility of a juror in responding to leading questions, listening to the tone of the responses given, that greater deference should be given to the trial judge's determination.

QUESTION: Exactly what findings of fact did the trial judge make?

MR. LANDRY: In the instant case the trial judge implicitly found that --

QUESTION: He didn't -- you say implicitly found?

MR. LANDRY: Yes, sir. We submit that the requirements of 2254 have been complied with here because we have an adequate written indicia in the record. We have the prosecutor asking questions which are consistent with the requirements of Witherspoon.

QUESTION: Well, doesn't 24 D, evidence by a written finding, written option, or other reliable and adequate written indica?

MR. LANDRY: Other reliable adequate written indicia, we submit, is the transcript of the trial, including the questions and answers, the questions propounded by the prosecutor, the answers given, the opportunity for the defense counsel to object and ask further clarifying questions, and the trial judge's

statement, his ruling at that point, we submit, is an adequate written indicia.

It's more or less similar to the situation, we think, in Novelli v. Dellarose in which the trial judge was called upon to make a determination as to the voluntariness of the confession. Now, he did not -- the trial judge did not articulate his credibility finding that he believed Witness A rather than Witness B, but it was clear, based on a totality of reading of the record that the trial judge had indeed made the findings that -

QUESTION: Well, the only totality is what you read us, I gather. That's only the interrogation or the colloquy between the witness and the prosecutor, wasn't it? There's nothing else in the record, is there?

MR. LANDRY: In front of the trial court; that's correct.

QUESTION: And you're asking us to give deference under 2254 D to some finding. I don't quite understand what finding it is you're asking us to give deference to.

MR. LANDRY: Well, the statement by the trial judge that the witness was excused pursuant to the prosecutor's motion.

QUESTION: All he said was, "All right, step down."

MR. LANDRY: Yes, sir.

QUESTION: Well, does your reading of the statute, then, really make the words "evidence by a written finding, a written opinion," superfluous, because there's always a transcript, I suppose. You say a transcript is all the statute contemplates.

MR. LANDRY: I don't think that is superfluous, no. But I think where we have an indication in the record here that the trial judge correctly understood the appropriate legal standard, then his conclusions, factual conclusions that he utilized to formulate the decision that he did, must be given respect.

QUESTION: Is it possible that the trial judge hearing this examination of the potential juror respond at least four times, saying, "I'm afraid, it would," "Yes, I am afraid it would," "I think so," and "I think it would," felt that that was so clear that no findings were necessary?

MR. LANDRY: That's indeed correct, that it was unnecessasry really for the trial judge, Judge Ryder, to further explicate the basis for his ruling by the fact that defense counsel did not object, and it was apparently clear to everyone in the courtroom that the juror's attitude was such that she could not impartially

decide guilt or innocence.

QUESTION: But may I ask, I gather the Witherspoon formulation is that you can remove for cause only those who make it -- and I'm quoting from Witherspoon -- "unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed in the trial in the case before them."

Now, what is it in that colloquy that you say satisfies that standard?

MR. LANDRY: I say that the four responses to the questions propounded by the prosecutor, indicating that her attitude had reached a plateau of interfering with the ability to decide guilt or innocence, adequately complies with Witherspoon.

QUESTION: I don't see any reference to guilt or innocence. What it is is whether that would interfere with you sitting as a juror.

QUESTION: Isn't one of the questions, would it interfere with the judgment of the guilt or innocence of the defendant in this case? And the answer was, "I think so."

MR. LANDRY: Yes, sir.

QUESTION: Mr. Landry, let me read you a more recent formulation of the Witherspoon remark. The case

of Adams v. Texas, where the court said this line of cases has established that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

I take it your submission is that the trial judge's ruling at the close of the colloquy certainly satisfied that standard.

MR. LANDRY: Yes, sir. To the extent that the lower court believed that there had to be a total conformity to the language of Footnote 21 in Witherspoon, he was mistaken. The restatement in Adams certainly indicates that if a juror's views are such that would prevent or substantially impair his performance, he may be excused for cause.

And, of course, the juror's response in this case did meet that criteria.

The error, we believe, of the Eleventh Circuit is an emphasis on requiring that there be an exact compliance with Footnote 21 terminology. Now, the Eleventh Circuit apparently has held that "interfere with," used by the prosecutor or by trial judge, is an impermissibly ambiguous statement.

We do not understand it to be so, and it is

really quite unclear as to when that phrase became ambiguous.

For example, at Footnote 5 of Witherspoon, this Court appears to have implied that the phrase, "interfere with the ability to determine guilt in accordance with the law and evidence," was interchangeable and synonomous with the phrase used in the text, "prevent from making an impartial decision as to guilt."

Now, if the Court in writing the Witherspoon opinion in Footnote 5 apparently thought or at least implied that the two phrases might be interchangeable, certainly the prosecutor and the trial judge cannot be criticized for similarly regarding the two phrases as the equivalent of each other.

In any event, it is clear from the record that there was no complaint by Mr. Witt attacking the alleged ambiguity of the question until some eight years after his trial and some two changes in lawyers after he had gone through his direct appeal, attacking only the response given by the juror, and similarly attacking that response in the Federal District Court, Judge Carr.

So, consequently, we submit that the lower court has erred in requiring a strict verbatim compliance with the requirements of Footnote 21, and

that contention that the Eleventh Circuit's ruling is inconsistent with the subsequently decided case of this Court.

In Lockett v. Ohio, for example, this Court did not require a strict reading of Footnote 21. There, the jurors were asked whether or not they could take an oath to well and truly try the case, despite their views on capital punishment. And negative answers to that question led to their excusal.

So we submit that it is not really the form of the question or the answer that is significant, but simply the total context of what the response given is as to whether a juror is able and willing to conform wth the law or not.

We think the Eleventh Circuit has erred in its determinations, and that this case is exactly the same as Adams v. Texas. We submit that this case is clearly distinguishable from Adams. Adams was a case involving the requirement under Texas law that someone take an oath that he would not be affected at all in his determinations of any question of fact based on his views of capital punishment.

He was not asked or gave no -- it did not matter whether or not he could follow the law; it did not matter that he could set aside whatever his views

were. If they had any kind of effect at all on his fact-finding deliberations by his capital punishment views, he was excused and apparently could not even be rehabilitated.

So the State of Florida does not ask or require anyone not to be affected by capital punishment. We simply insist that a juror be willing to assure the trial judge that he can follow the law and follow the instruction of the court and follow the law on the evidence.

If he is not willing to give that assurance, then we submit that he is properly excused for cause under Lockett v. Adams. We ask this Court to --

QUESTION: Well, if a juror were to say the juror was opposed to capital punishment but nevertheless could decide the case based on the evidence and the instructions, would that give rise to any excuse for cause on the part of the State?

MR. LANDRY: No, ma'am. If the juror can follow the law and according to the instructions given and the evidence adduced at court, then he should not be excused. And Florida does not insist that he should be.

I would like to reserve the remaining time for my rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. McLain.

ORAL ARGUMENT OF WILLIAM C. MC LAIN, ESQ.

ON BEHALF CF RESPONDENT

MR. LANDRY: Mr. Chief Justice, may it please the Court, initially I'd like to present two additional facts for the Court's attention. First, Mr. Witt did argue in the district court, contrary to the State's assertion, that the prosecutor's questions were ambiguous and improper under the Witherspoon standard.

I'd like to give four references to the district court record. Document No. 3 in the record, Memorandum for Application of Stay at page 25; Document No. 7 of the record, Supplemental Memorandum for Application of Stay at pages 8 and 10 --

QUESTION: Did he ever argue that in the Florida trial court?

MR. MC LAIN: It was not focused on in the Florida trial court, and I would point out -- the second fact I would like to bring to the Court's attention was that Mr. Witt's trial counsel in the state trial court and on appeal admitted, in a deposition which was introduced into evidence at the habeas hearing, that he was not even aware of the Witherspoon decision as the time he selected the jury in this cae.

QUESTION: Well, how does that bear on his failure to raise it in the trial court?

MR. MC LAIN: His failure to raise it in the trial court -- the Florida Supreme Court addressed this question on the merits.

QUESTION: Yes. I realize that there is a proper basis for finding that there has been no Wainwright v. Sykes bar. But when you're insisting, from the point of view of a defense lawyer in a criminal case, that a question on voir dire by the prosecutor is not as precise as it should be or doesn't use the right words, don't you have some obligation if you're going to make that point later, to try to focus on the question and ask some questions yourself?

This defense counsel just stood mute.

MR. MC LAIN: That's correct, Your Honor, and I think his statement in the deposition explains why; that he was unfamiliar with the Witherspoon standard at the time he selected the jury.

QUESTION: Does that bear on his obligation, if the point is later to be made, eight years later in the case, that a particular question on voir dire wasn't proper, that he ought to do something about it then?

MR. MC LAIN: Yes, Your Honor. I'm just saying as an explanation of perhaps why he didn't do

anything and why it can't be indicative of a demeanor finding in the trial court on his part for failing to object. We can't say that he perceived it as being unmistakably clear, because he was not aware of the Witherspoon standard at that time.

QUESTION: No, but it's the judge who has to -- and I think the Adams language doesn't really use the words "unmistakably clear." It says, "based on his views about capital punishment, unless those views would prevent or substantially impair the performance of his duties as a juror."

That's really a more recent formulation and it's in the text rather than the footnote.

MR. MC LAIN: I think Adams v. Texas really controls this decision because the term "interfere" as used in his questions in this case suffers the same flaw as did the term "affect" in the questions used in the Texas case.

QUESTION: Do you think if the court or the district court had made findings, that could have remedied this problem? Or the absence of findings, is the absence of findings irrelevant?

MR. MC LAIN: The absence -- I don't think the Witherspoon question, whether Witherspoon questions are treated as ones involving historical fact, accorded the

presumption of correctness under 2254 D, is really relevant to deciding this case at all, because even under the terms of 2254 D, the pertinent fact for dispute was not decided. We have no findings of fact in this case, either explicit findings or implicit findings.

Consequently, the issue, the applicability of 2254 D, is not presented in this case.

QUESTION: If the district judge, the trial judge had thought that some findings were either necessary or helpful, do you suppose he might have been dissuaded from making them by the fact that there was no objection to the excusing of this juror?

MR. MC LAIN: That may have been the case, Your Honor. I can only speculate.

QUESTION: Well, what's your answer to your adversary's argument that if challenge for cause was sustained, that that action in and of itself carries with it findings?

MR. MC LAIN: I don't think this record is capable of demonstrating an implicit finding of fact. First, because there is no indication that the trial court used the correct legal standard in excusing Juror Colby for cause.

We cannot infer a finding of fact where there is no clear legal standard employed. We don't know

whether the trial judge was operating under the correct Witherspoon standard, for a number of reasons: first, one was not articulated at the time Juror Colby was excused. Furthermore, we cannot presume that the trial court was using the correct legal standard because of the state of Florida law at the time.

In Florida, 1969 decision, Williams v. State, the Florida court adopted an erroneous interpretation of the Witherspoon standard from the New Jersey case, State v. Mathis, which would allow the excusal of jurors for cause precisely because their responses to the inquiry were equivocal.

The Florida court adopted that rule in Williams, and I would note that the State, on direct appeal to the Florida Supreme Court, argued both Williams and Mathis to that court.

Also note that subsequent to Mr. Witt's trial and appeal, the Florida court is perhaps still laboring under this erroneous rule. As recently as 1980 in Brown v. State, the rule was again quoted and articulated in the Florida Supreme Court decision.

The court ruled in this case solely upon prosecutor's inquiry, solely upon the ambiguous questions, which did not employ the correct legal standard under Adams.

QUESTION: Well, does that imply that the judge didn't know the right standard?

MR. MC LAIN: It implies the judge did not, by acting upon the prosecutor's inquiry alone which did not comply with the Witherspoon standard.

QUESTION: The answers to a question might give the judge what he thought anyway was enough evidence to apply the correct standard.

MR. MC LAIN: I don't -- it would not in this case because of the nature of the questions. The term "interfere" -- and I think we have to focus on how the jurors, a reasonable juror might have interpreted the word "interfere." And that may be quite a bit different than the way it's treated by commentators or members of this Court in writing opinions.

But the "interfere" term is not as clear as the term "prevent." And it is subject to varying interpretations. And therein lies the difficulty in gleaning a finding of fact in this record.

Even if we had an unequivocal yes answer from Juror Colby to a question that merely asked if her beliefs would interfere, we still don't know the profundity of that interference or the degree of that interference.

QUESTION: There is language, though, as was

pointed out by Mr. Landry, in Witherspoon itself, using the word "interfere," where the Court said courts and other states have sometimes permitted the exclusion for cause of jurors opposed to the death penalty, even in an absence of a showing that their scruples would have interfered with their ability to determine guilt and so forth.

There is discussion using the word "interfered."

MR. MC LAIN: Yes, Your Honor. Again I say the term has to be evaluated in the manner in which it might reasonably be construed by a juror.

And it is subject to differing interpretations. Some of those interpretations --

QUESTION: Did the court below give any deference, or did it treat this as a mixed question of law and fact?

MR. MC LAIN: Your Honor, the court below noted that there was some uncertainty in the lower courts. Footnote 10 of the opinion --

QUESTION: So what standard did it apply?

MR. MC LAIN: The court conducted an independent review of the record.

QUESTION: Well, now let's assume we decide that's wrong; that it's really entitled to a presumption

of correctness because it's a historical fact, like bias. And suppose --

MR. MC LAIN: I don't --

QUESTION: We don't need to argue whether that's right or wrong.

Suppose we decide that they applied the wrong standard to this case? Shouldn't we remand it and have them review it under the correct standard?

MR. MC LAIN: Well, in Footnote 10 of their opinion, they noted the uncertainty regarding the standard to be employed in reviewing findings of fact in the Witherspoon context. However, they went on to say that even under the least rigorous standard, the 2254 D standard, that they would have reached the same results, and for the reasons that there were no findings made b the trial court.

QUESTION: Did you try this case, Mr. McIain? Were you trial counsel?

MR. MC LAIN: I was not trial counsel in the state court. I was co-counsel in the district court, and I was counsel in the court of appeals.

QUESTION: Well, when defense counsel are so anxious to have a person on the jury who expresses reservations such as are made here in at least four responses, does that tell us anything about whether

defense counsel wants people with these reservations on juries?

MR. MC LAIN: I'm sorry, Your Honor?

QUESTION: Is that a totally unbiased juror? That's the question. A juror who says it would interfere with judging the guilt or innocence.

MR. MC LAIN: The Witherspoon standard requires the state to make an affirmative showing that the juror is, in fact, impartial. When there is an ambiguous showing of whether the juror is impartial, then Witherspoon does not permit the exclusion of that juror. If the juror were unable to answer --

QUESTION: Your position here is that the response that it would interfere with judging the guilt or innocence of the defendant shows no bias?

MR. MC LAIN: It perhaps shows an uncertainty regarding the position of the juror, but it does not make unmistakably clear that the juror would be prevented from --

QUESTION: Well, you really have to read Witherspoon in light of Adams, too, don't you?

MR. MC LAIN: Yes, Your Honor. I think again, we go right back to the possible interpretations of the term "interfere," and the possible interpretations the jurors could reasonably impose upon that term.

QUESTION: Of course, the trial judge has the benefit that no reviewing court can have of the demeanor evidence of the witness. What seems to perhaps suggest ambiguity on the record may, in the view of the trial judge, in view of facial expressions or tone of voice, convey quite a different mode.

MR. MC LAIN: That's correct, Your Honor, and we are not contending that there should be absolutely no deference paid to any pertinent demeanor findings made by a trial court, even --

QUESTION: Well, are you saying that if a trial court -- supposing a challenge is underway for bias, not on the Witherspoon ground, but just on the grounds that the witness is biased against the plaintiff. And the defense lawyer conducts -- or is biased against the defendant.

The prosecutor conducts voir dire. The defendant coducts voir dire. And the trial judge then says the witness is excused for cause.

Are you suggesting that to comply with 2254 D, the trial judge would have to go further and say the reason I am excusing this juror for cause is that I disbelieve some of her statements, and also she turned red when she was asked question 3?

MR. MC LAIN: I think certainly 24 -- perhaps

not required for application of 2254 D, in that there could be an implicit finding of fact in that case, provided the correct legal standard was employed.

However, when we're dealing with a situation of excusing jurors because of some personal bias, we're really dealing with a different standard than we're dealing with in the Witherspoon context. In the Witherspoon context, we're talking about a much higher standard and an affirmative showing on the part of the State regarding the juror's beliefs and the impact of those beliefs on the ability to judge the case impartially.

In excusing a juror because of some personal bias, it's really a negative showing there as opposed to an affirmative showing. And, furthermore, the Witherspoon standard is -- part of the constitutional standard established in Witherspoon is a higher standard for excusal for cause because it's excusing a class of jurors based upon their beliefs, as opposed to an individual juror based upon some personal bias.

I would note that I think the Eleventh Circuit Court of Appeals has, in a later case, after this decision -- the Darden case -- articulated what is perhaps the correct standard of review in the Witherspoon questions.

An independent review of the record to ensure that the correct Witherspoon standard has been faithfully met and satsified but, at the same time, recognizing that, where appropriate, some deference should be given to trial court findings. This strikes a balance between the Witherspoon standard and the need to ensure that that legal standard is appropriately complied with and with the need to give appropriate deference to demeanor findings by the state trial court.

QUESTION: Mr. McLain, is the underlying purpose of the holding in Witherspoon simply to prevent the State from excusing for cause jurors who are opposed to capital punishment? That that enough isn't sufficient to find an excuse for cause.

But is there anything in Witherspoon that says if a juror is found to be biased on the question of finding guilt or innocence, either way, that that juror should not be excused?

In other words, if a juror, a trial prospective juror, is determined to be biased on the question of finding guilt or innocence, the juror is unable to follow the court' instructions or unable to decide the case based on the evidence, is there anything in Witherspoon that prevents excusing such a juror for

cause, in your view?

MR. MC LAIN: That juror could be excused if that bias was a product of opposition to the death penalty; that under no circumstances --

QUESTION: Well, for whatever reason, including opposition to the death penalty.

MR. MC LAIN: I don't recall Witherspoon addressing that precise question.

QUESTION: Well. isn't that what we have here really?

MR. MC LAIN: No, Your Honor, I don't think that's what we have here, because the nature of the inquiry was focusing directly upon this juror's oppostion to the death penalty. And when that focus takes shape, then the Witherspoon standard must be applied.

I would note that the standard of review articulated by the Eleventh Circuit in the Darden case, while not giving the presumption of correctness to the findings of fact, still does strike the appropriate balance to be made between independent review of the record to ensure the Witherspoon standard is appropriately applied, and still giving respect due to state court findings.

QUESTION: Suppose a juror says, "Well, I am

not inalterably opposed to the death penalty. I don't believe in it; I would never vote for it if I were a legislator, and I couldn't say that I never would vote to impose the death penalty, but I'll tell you right now, it's very likely to influence the way I decide guilt or innocence. I mean, I'm opposed enough to it that it would warp my judgment, I think. Just inevitably, it would."

Now, could that juror be excused, even though his responses to the death penalty questions aren't exactly like Witherspoon?

MR. MC LAIN: Under the Witherspoon standard, that juror could not be excused based upon --

QUESTION: Yes, but how about under some other standard? I mean, Witherspoon didn't address that. All Witherspoon addressed was how opposed do you have to be to the death penalty, without any other evidence, to assume that the juror can't perform?

Here, a juror says, "Yes, it will. It will. I'm opposed enough that it will influence my judgment."

MR. MC LAIN: I think this Court --

QUESTION: "May impair my judgment."

MR. MC LAIN: This Court, in Adams v. Texas, held that those kinds of feelings, even though the juror could nevertheless indicate that they could judge the

case on the evidence, but candidly admitted that their beliefs might have some influence, this Court in Adams v. Texas said that juror could not be excluded under the Witherspoon standard.

QUESTION: Do you think the responses here are comparable to the Adams responses?

MR. MC LAIN: Yes, Your Honor, I do. I think the -- excuse me -- the responses or the questions?

QUESTION: Questions and responses. The inquiry to this potential juror. Do you think they are essentially the same in both cases.

MR. MC LAIN: Essentially the same; yes.

QUESTION: Well, Mr. McLain, do you think that Witherspoon at least partially cut back on the previously established general rule that a juror who said that they could not faithfully follow the court's instructions couldn't sit as a juror?

That wasn't my impression.

MR. MC LAIN: No, Your Honor. I think the the jurors who say they cannot follow the court's instructions or the law in deciding the case would not be permitted to sit as a juror.

QUESTION: Witherspoon simply said, as I understand it, if you're simply excusing people because they're opposed to capital punishment, you're excusing a

group of people who are entitled to sit on the jury; unless you would go further and say no, because of that belief they couldn't follow the court's instructions.

So the general principle is, if you can't follow the court's instructions on the law, you can be excused.

MR. MC LAIN: That's correct, Your Honor. However, it must be an affirmative showing by the State before the excusal is proper.

QUESTION: Well, in fact, doesn't the Sixth Amendment and due process probably require unbiased jurors on the guilt/innocence question? Isn't that a separate constitutional requirement?

MR. MC LAIN: Of unbiased jurors?

QUESTION: Yes.

MR. MC LAIN: Well, certainly the --

QUESTION: On the question of guilt and innocence.

MR. MC LAIN: Certainly, the defendant is entitled to an unbiased jury.

QUESTION: And isn't it a question of fact for the trial judge to determine whether a particular prospective juror is unbiased?

MR. MC LAIN: It is a determination for the trial judge to make, of course, whether a juror is

biased or not biased, or whether a juror, as in this case, fits under the Witherspoon standard. Of course, that's an initial determination by the trial judge.

QUESTION: You were saying that on this record, those four or five responses, that this did not show a bias that would have affected the judgment on guilt or innocence?

MR. MC LAIN: No, Your Honor, it does not show a bias that would have -- perhaps affect it, but again --

QUESTION: Then you and I aren't reading the same record.

MR. MC LAIN: The juror -- the juror indicated that her beliefs, she thought, might interfere. However, she was never asked the question of whether she could set -- sit whatever interference it might pose aside, and nevertheless follow the law in the evidence. She was never instructed, in putting her inquiry in a little more context perhaps.

QUESTION: And you base this all on the idea that the word "interfere" is so ambiguous that the statement that it would interfere with judging the guilt or innocence does not reflect a bias?

MR. MC LAIN: It does not reflect an adequate bias for an excusal under Witherspoon.

QUESTION: And the answer to that was yes;

that it would interfere. She didn't have any -- the juror didn't have any difficulty in understanding what "interfere" meant.

MR. MC LAIN: We still don't know, we still can't glean the interpretation the juror was placing on the word "interfere." She may have thought "interfere," to the extent of making the decision more difficult for her, but nevertheless she could set that -- may have been able to set that difficulty aside and still the follow the evidence and the law of the case, and decide the case impartially.

I think anytime we're dealing with jurors, human beings are going to have factors or variables that's going to make certain decisions less comfortable for them to make, and that's inherent in the jury system.

But that is not a reason for excluding the juror, just because the decisionmaking process may be made uncomfortable for them.

QUESTION: Well, what if the juror, on voir dire, discloses that, -- for instance, in this case Miss Colby disclosed that her brother was a policeman who'd been injured in the line of duty, and her brother-in-law was a county prosecutor at one time, and she responds in answer to a question about whether that would interfere

with her sitting as a trial juror in the case, she responds, "Well, I think it would, actually. I'm afraid it would interfere with my ability to judge the guilt or innccence."

Do you think the defendant would have a right to excuse that juror for cause?

MR. MC LAIN: I think only if the defendant -- excusal for cause would be appropriate only if the defendant could establish that that interference would prevent from her --

QUESTION: Well, on that exchange, is that enough, do you think? Wouldn't you be in here arguing if that had been denied you, that the court should have excused that juror for cause?

MR. MC LAIN: That -- again, the inability of the juror to nevertheless follow the law has not been established by the inquiry. Certainly there are things in that juror's background which would create difficult in deciding the case.

QUESTION: When the juror says, "Look, it will interfere with my ability to judge guilt or innocence."

QUESTION: How else do you establish, other than by a statement of the juror?

MR. MC LAIN: That's correct, Your Honor, and I think we still, going back to the inquiry in this

case, we just -- we can't determine, because of the ambiguity, both in the questions and the responses.

QUESTION: How much more do you have to ask? You ask the juror, well, what do you mean "interfere"? "Well, I would be more likely to find the defendant guilty than someone who hasn't had these experiences."

Is that enough?

MR. MC LAIN: That might very well be enough.

QUESTION: Might?

MR. MC LAIN: I think that would probably be a basis for excusing the juror. But again, the appropriate Witherspoon --

QUESTION: Wouldn't that be the inference that you would draw from the juror's statement, "It would interfere with my -- these kinds of experiences would interfere with my finding guilt or innocence"?

MR. MC LAIN: We still come back to the question, "intefere" simply does not mean, or necessarily mean to each and every juror responding to such a question, prevent the ability to follow the law and the evidence in the case and assign guilt.

And we also have a different situation when we're talking about the State excusing a juror under the Witherspoon standard and the defense's position of excusing a juror under some other personal bias

standard.

I think the Witherspoon standard was imposed upon the State to assure that an inappropriate, overbroad restriction of the jury pool does not occur.

My time is short. In view of the questions, that concludes my argument.

CHIEF JUSTICE BURGER: Very well, Mr. McLain.

Do you have anything further, Mr. Landry?

MR. LANDRY: Nothing further, Your Honor.

CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

We will hear arguments next in United States v. Young.

(Whereupon, at 11:47 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:
#83-1427-LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA, DEPARTMENT OF CORRECTIONS Petitioner, V. JOHNNY PAUL WITT

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)