

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 84-1865

**TITLE** A. L. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT  
CORRECTION, Petitioner V. ARDIA V. MCCREE

**PLACE** Washington, D. C.

**DATE** January 13, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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A. L. LOCKHART, DIRECTOR, :  
ARKANSAS DEPARTMENT :  
CORRECTION, :  
Petitioner :

v. : No. 84-1865

ARDIA V. MCCREE. :

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Washington, D.C.

Monday, January 13, 1986

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:02 o'clock a.m.

APPEARANCES:

JOHN STEVEN CLARK, ESQ., Attorney General  
of Arkansas, Little Rock, Arkansas; on behalf of  
Petitioner.

SAMUEL R. GROSS, ESQ., Stanford, California;  
on behalf of Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Lockhart against McCree. Mr. Attorney General, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN STEVEN CLARK, ESQ.  
ON BEHALF OF PETITIONER

MR. CLARK: Mr. Chief Justice and may it please the Court:

The facts simply stated are these: Ardia McCree on Valentine's Day of 1978, in the course of robbing La Tienda Gift Shop and Service Station, killed Evelyn Boughton, the owner operator, with a shotgun blast to her face. He was charged with capital felony murder. The state sought the death penalty.

McCree was tried before a jury which was qualified in accordance with Witherspoon and nine prospective jurors who would not consider the full range of punishments to include the death penalty were removed for cause. McCree was found guilty and sentenced to life without parole.

The conviction was appealed to the Arkansas Supreme Court and was affirmed.

QUESTION: General Clark, where in Arkansas was McCree tried?



1 MR. CLARK: He was tried in Ouachita County,  
2 Justice Rehnquist, where the crime was committed, in  
3 Camden, Arkansas.

4 QUESTION: And where did the venire come from,  
5 from a particular state judicial circuit in that case?

6 MR. CLARK: It is the state judicial district  
7 which comprises two counties, Union County and Ouachita  
8 County, population of about 75,000 together.

9 Post conviction relief was denied to Mr.  
10 McCree. In 1980 he filed his petition for habeas  
11 relief, which leads us to this Court today. I'll  
12 discuss the issues of impartiality and then cross  
13 section as raised by Mr. McCree, but before I undertake  
14 to analyze McCree's particular constitutional claims I  
15 think it's important that we put this case in its  
16 perspective.

17 This case may be one of the most important  
18 criminal cases this Court will consider this term, for  
19 if the decision below is affirmed the potential is that  
20 some 90 percent of those inmates who comprise death row,  
21 numbering 1500, may have to be retried; that in 33 of  
22 the 37 states that allow for capital punishment their  
23 statutes may have to be changed through special  
24 sessions; and that some 3,000 to 5,000 inmates minimally  
25 who were charged with capital offenses but got sentences

1 of less than death, either life without or life  
2 imprisonment, may potentially be tried again.

3 I believe it's essential for those claims --

4 QUESTION: General Clark, I would assume that  
5 would only be if such a holding were made retroactive.

6 MR. CLARK: Yes, Your Honor.

7 In putting these claims in perspective,  
8 McCree's basic complaint is that Witherspoon excludibles  
9 were barred from potential membership on the jury that  
10 heard the guilt phase of his trial. Factually, those  
11 nine prospective jurors were excluded due to the  
12 requirements of two entirely neutral and unassailable  
13 features of Arkansas state law.

14 The first feature is the state of Arkansas has  
15 determined that in criminal cases the issue of guilt and  
16 innocence should be decided by the same jury, as we  
17 believe that the jury acts as a safeguard, if you will,  
18 in the criminal justice establishment between the  
19 defendant and that establishment; that the policy and  
20 the law that require that has been the policy in our  
21 state for more than seven decades.

22 Secondly, the state of Arkansas naturally  
23 decided to exercise its option, when granted by  
24 Witherspoon, to prevent any juror from determining  
25 sentence who said he would, explicitly vowed, that he

1 would under no circumstances follow state law, which  
2 included the penalty of death.

3 QUESTION: General Clark, may I inquire about  
4 this matter? Does it make any difference here that,  
5 after the state had excused these jurors for cause under  
6 Witherspoon, that it later waived its request for the  
7 death penalty?

8 MR. CLARK: Your Honor, I don't think that it  
9 makes a difference. The state has --

10 QUESTION: Does that leave open for  
11 manipulation by the state in a given case an option to  
12 excuse jurors under Witherspoon and then plan all along  
13 to waive a request for the death penalty?

14 MR. CLARK: Your Honor, I don't think it was  
15 the intent of the state to leave open an option to  
16 procedurally come back and attempt to bar this effort.  
17 The state of Arkansas faces this fact: With some 27  
18 inmates on death row and 146 other persons who were  
19 charged with a capital offense but got some lesser  
20 offense, the need to determine factually whether the  
21 assertions of McCree are constitutional, and what we  
22 will be facing if in fact this Court affirms the  
23 decision of the court below.

24 And so in the waiver of that procedure which  
25 we waived, and I admit that to this Court, we thought we

1 had a chance to get at the essence of the merits of this  
2 issue and get some direction from this Court as to where  
3 we should go as a matter of policy.

4 QUESTION: But does the record disclose in  
5 this case why the state opted to proceed as it did and  
6 forego requesting the death penalty, after initially  
7 embarking on that course?

8 MR. CLARK: Your Honor, the answer to that  
9 question is yes, that in this instance, as with Grigsby  
10 in the case that was a companion case, that they were  
11 consolidated -- and as the Court may be aware, Mr.  
12 Grigsby died while he was in prison -- that in this  
13 instance what we did was we waived this issue because of  
14 the fact that, as I said, we wanted to get to the crux  
15 of the issue before the Court.

16 QUESTION: I don't think that responds to my  
17 question. My concern is that is I understand this case  
18 the state proceeded initially when it empaneled a jury  
19 on the premise that it was going to ask the death  
20 penalty.

21 MR. CLARK: Yes, Your Honor.

22 QUESTION: And it excused for cause some  
23 jurors under the Witherspoon doctrine, right?

24 MR. CLARK: Yes, Your Honor. We excused those  
25 who said they would not follow state law.



1 QUESTION: And then at some time after or  
2 during the trial, the state decided not to seek the  
3 death penalty after all.

4 MR. CLARK: In the trial with Mr. McCree, the  
5 verdict that was returned was life without parole. The  
6 state in that instance, Your Honor, I don't think  
7 waived.

8 QUESTION: The state never backed off and  
9 decided not to seek the death penalty? That had been my  
10 understanding.

11 MR. CLARK: Not in McCree, Your Honor. In  
12 Grigsby that was the case. In the Grigsby trial we did

13 --

14 QUESTION: But not in McCree?

15 MR. CLARK: Not in McCree.

16 QUESTION: All right.

17 MR. CLARK: Yes, Your Honor.

18 McCree must prove why it is constitutionally  
19 impermissible for the state of Arkansas to follow both  
20 of these rules at the same time. He must demonstrate  
21 that the Constitution requires that Witherspoon  
22 excludibles be eligible for the guilty phase in juries in  
23 capital cases.

24 Put differently, I submit to this Court that  
25 McCree must show that the Constitution demands that

1 jurors be eligible for the jury who will not follow  
2 state law. This Court in *Wainwright* and *Witt* stated  
3 that the party seeking to exclude jurors for bias has  
4 the initial burden of establishing that bias. Clearly,  
5 Arkansas did that here when it discovered that those  
6 nine prospective jurors explicitly vowed that they would  
7 not follow state law.

8 The right to an impartial jury based in the  
9 Sixth and the Fourteenth Amendments can be defined best  
10 succinctly, I think, as the right to have one's case  
11 decided solely on the basis of the evidence presented  
12 and of the instructions of the court. McCree's evidence  
13 does not even begin to show jury bias within the meaning  
14 of this Court's opinions. It provides no basis  
15 whatsoever for concern that the jurors who voted to  
16 convict McCree violated their oaths, or that they relied  
17 on something other than the evidence presented or the  
18 arguments of counsel, or that they disavowed and did not  
19 follow the instructions of the court.

20 In fact, McCree has presented no attack of any  
21 kind on the performance of his jurors. The key flaw in  
22 McCree's approach is its failure to look at the  
23 individual members of his jury who actually decided his  
24 case.

25 The only fact that we know about the jurors

1 that were not allowed -- that were allowed, excuse me,  
2 to serve, is that they stated they were willing to  
3 consider the full range of punishments in this case,  
4 which included the death penalty. The fact that the  
5 jury might possibly impose the death penalty alone if  
6 justified does not establish that those jurors in  
7 McCree's case are incapable of rendering an impartial  
8 verdict.

9 To the contrary, there is a presumption of  
10 impartiality which attaches to McCree and to McCree's  
11 jurors in particular, which arises, one, from the trial  
12 court's determination that they were qualified to sit;  
13 and two, from their stated oath they would follow state  
14 law.

15 QUESTION: Mr. Clark, doesn't your argument  
16 prove too much? Supposing they excluded all Democrats,  
17 for example, and left just nothing but Republicans, and  
18 you could prove all the Republicans were perfectly  
19 impartial. Would that be permissible?

20 MR. CLARK: Your Honor, if in fact you were  
21 trying to exclude these and identify them as a denial of  
22 a cross-section because they were a distinct group and  
23 they were recognizable and they were sizable and they  
24 were systematically excluded, perhaps you would be  
25 moving toward that argument, which I will address later

1 in my argument to this Court.

2 But in this instance what McCree has said and  
3 the Eighth Circuit sort of merged was the impartiality  
4 and the cross-section violation. There's nothing in the  
5 record that demonstrates that McCree's jurors were  
6 anything other than impartial.

7 QUESTION: Well, I understand that. But in my  
8 hypothetical, if you had nothing left but Republicans  
9 would that be permissible? Say they're all impartial.

10 MR. CLARK: If in fact in qualifying these  
11 jurors they were excused because they were going to be  
12 partial --

13 QUESTION: No, no. They just excluded all  
14 Democrats and left nothing but Republicans.

15 MR. CLARK: Well, if you start taking just  
16 --

17 QUESTION: And they're all impartial  
18 Republicans.

19 MR. CLARK: -- that's not permissible.

20 QUESTION: That's not permissible?

21 MR. CLARK: That's not permissible, just to  
22 say all Democrats or all members of associations, I  
23 don't think, because you would have to demonstrate that  
24 they're not --

25 QUESTION: All I'm suggesting is it doesn't



1 seem to me a complete answer to the case to say that the  
2 remaining jury, examined individually, each one of them  
3 there's no objection to. That's what your argument is,  
4 as I understand it.

5 MR. CLARK: Your Honor, no, that's not the  
6 thrust of my argument. It's not just that the remaining  
7 jury was impartial. It was the fact that these jurors  
8 were excluded not because of their belief in the death  
9 penalty; they were excluded because they would, they  
10 vowed explicitly they would, not follow state law.

11 In the Court's example, if all Democrats said,  
12 we will not follow state law, and that left only  
13 Republicans, then I think you'd have a properly  
14 comprised jury. If you just excluded Democrats for the  
15 reason they held that title or avowed to that certain  
16 political party, then I think you're treading on  
17 constitutional violations that can be demonstrated by the  
18 defendant.

19 QUESTION: Well, General Clark, I thought that  
20 Respondent's argument was more along the lines of an  
21 argument that by excluding these jurors at the  
22 guilt-innocence phase of the case that it was a  
23 procedure whereby the state has organized the procedure  
24 in such a way that it would be more likely to result in  
25 a guilty verdict because of the evidence produced by the

1 studies, not that the jury panel was in fact biased or  
2 not impartial, but that it was a procedure by which the  
3 state is more likely to obtain a jury which will vote  
4 for a guilty verdict.

5 I thought that was the thrust of their  
6 argument.

7 MR. CLARK: Well, Your Honor, if that is the  
8 thrust, I would look at it from this standpoint. The  
9 procedure is that of a unitary system, a unitary jury,  
10 one that determines both guilt and penalty. It is the  
11 policy of the state of Arkansas, founded in this state  
12 interest, that we believe that same jury should consider  
13 guilt and innocence as well as penalty, for we believe  
14 that in fact it acts as a safeguard, as a check, if you  
15 will, against that criminal justice establishment.

16 QUESTION: Well, that leads to the question of  
17 whether the state's interest, which of course is  
18 substantial, is more substantial than the defendant's  
19 interest in having a fair procedure.

20 MR. CLARK: I submit to this Court that is.  
21 But in taking the procedural argument one step further,  
22 what McCree does argue, Your Honor, is in fact that the  
23 policy in Arkansas is not good policy: We don't like  
24 this policy of the unitary jury. That is not the same  
25 as, there is a constitutional violation in this process,

1 and it's clearly distinguishable.

2 If Mr. McCree wants the policy changed, his  
3 proper forum is the Arkansas legislature in changing  
4 that policy. But in regard to the procedure, the state  
5 interest that we determine that we want to protect first  
6 and foremost is that we believe that jury does act as  
7 that safeguard in that criminal justice establishment  
8 and it is important that the same jury hear guilt and  
9 punishment so as not to diminish their responsibility as  
10 a juror, so that one juror sitting only in the guilt  
11 phase says, I am absolved of all concern and  
12 responsibility as to penalty because I am not affected  
13 in terms of making that decision, or the reverse if you  
14 were the penalty jury.

15 And for those reasons, as well as reasons of  
16 economy and efficiency, but the first one is that state  
17 interest. Without conceding the validity of any of  
18 McCree's assertions to this Court, as to the mere  
19 existence -- the issue as to the mere existence of any  
20 predilection or notion or concern by defendants in  
21 general, without some other objective criteria, is to  
22 establish a standard that allows them to be excluded  
23 because of their predilection or their notion, allows  
24 them to be excluded, is to establish an impossible  
25 burden for the state to meet.

1 I implore this Court to consider this. Eight  
2 out of ten people in this nation have support, based on  
3 surveys, of capital punishment, in Arkansas better than  
4 nine out of ten. We have said repeatedly throughout  
5 this case, and this Court has affirmed, that we have the  
6 right in certain instances to exclude certain persons or  
7 professions from the jury: lawyers, if you will,  
8 doctors in some instances, in Arkansas chiropractors,  
9 dentists, dental assistants and others.

10 We have said that that has a legitimate basis  
11 in doing so. They perhaps make up a sizable, distinct  
12 group that may have a predilection or some notion or  
13 concern as to guilt or innocence. But if we rely on  
14 social science data to jump to a legal conclusion, you  
15 put the burden on the state of having an impossible task  
16 of meeting, a jury that in fact would be impartial as  
17 required by the Sixth Amendment.

18 What the Constitution requires is not that a  
19 jury have a particular mix of viewpoints.

20 QUESTION: Did I understand you that if 80  
21 percent of the people of this country are against the  
22 Sixth Amendment, it doesn't apply?

23 MR. CLARK: No, Your Honor, I would not say  
24 that and would never contend that.

25 QUESTION: You were getting awfully close.



1 MR. CLARK: We do not contend that, Your  
2 Honor.

3 What the Constitution requires is not a jury  
4 with a particular mix of viewpoints that the defendant  
5 would prefer, but a jury that is made up entirely of  
6 persons who will evaluate the evidence --

7 QUESTION: General, when you said that  
8 Arkansas perhaps excluded lawyers or doctors and  
9 chiropractors, were those just hypothetical examples or  
10 does Arkansas in fact exclude certain occupations?

11 MR. CLARK: Specifically, Your Honor, we do  
12 exclude professions: doctors, lawyers, chiropractors,  
13 dentists, dental hygienists, firemen, Christian  
14 Scientists. There's a whole group that may be excluded,  
15 yes, Your Honor.

16 QUESTION: As a matter of mandate or as a  
17 matter of choice on the part of the person who's  
18 summoned for jury duty?

19 MR. CLARK: Your Honor, it's matter of  
20 choice. It's not a matter of mandate.

21 QUESTION: There's no statutory category?

22 MR. CLARK: No statutory, except for felons,  
23 which are disqualified, which are in fact  
24 disqualified..

25 QUESTION: But this recital is not a statutory

1 exclusion that you were reciting?

2 MR. CLARK: No, sir, Your Honor. It is not a  
3 statutory exclusion. It is a statutory definition of  
4 those who can be excluded.

5 QUESTION: Are you saying as a practical  
6 matter you don't find doctors, lawyers, and businessmen  
7 on juries, generally speaking?

8 MR. CLARK: No, Your Honor, I would not say  
9 that. They do comprise juries from time to time in my  
10 state and I'm sure across the country. But in this  
11 instance, if you take the rationale that is advanced by  
12 McCree and say that you cannot distinguish a group  
13 because of some single notion or predilection that they  
14 have, then where do you stop?

15 Where does this Court finish litigating that  
16 matter? Because in this instance this policy of  
17 Arkansas has been if you are a doctor you can be  
18 excused, if you are a chiropractor you can be excused,  
19 not that you must but you can be. This may in fact then  
20 rise to the issue of some sizable group. It may rise to  
21 the fact that there's some distinct group, and may show  
22 some effort, at least arguably from social science data,  
23 as to how they may affect or predict actions on a jury  
24 and be excluded for some systematic reason.

25 What I have argued to this Court is that I

1 would ask you to consider sincerely that what the  
2 Constitution requires, as I said, is not a particular  
3 mix of viewpoints, but in fact a jury made up entirely  
4 of persons who can and will evaluate the evidence  
5 fairly.

6 It would be folly, I submit to this Court, to  
7 go beyond that requirement and find a jury bias in every  
8 case where the defendant shows that his jurors'  
9 attitudes somehow did not perfectly mirror the range of  
10 attitudes in the general population.

11 Concerns of this kind about the relative mix  
12 of juror attitudes on issues other than matters to be  
13 decided must be recognized under some other  
14 constitutional theory, I submit to this Court. The  
15 Court has recognized -- the court below, excuse me, the  
16 Eighth Circuit recognized, McCree's claim that the  
17 exclusion of Witherspoon excludibles violated the  
18 constitutional right to a jury drawn from a fair  
19 cross-section of the community. But I submit to this  
20 Court, in doing so it seriously distorted the  
21 requirements in order to establish a prima facie  
22 violation.

23 As this Court has identified, that violation  
24 is shown when you identify a group that is distinctive  
25 in the community, one that the representation of that

1 group is sizable in relation to the rest of the  
2 community, and that they're systematically excluded.

3 This Court has never precisely defined  
4 cognizability, but it is clear that the Court has never  
5 found that attitude alone defined a cognizable group.  
6 There's no basis for applying that requirement, I  
7 submit, in this cross-sectional representation, where  
8 the excluded group shares only one single attitude.

9 This Court has held that the basic purpose of  
10 the right to a jury drawn from a fair cross-section of  
11 the community is the furthering of that democratic  
12 function of the jury, both by placing a democratic body  
13 between the defendant and the criminal justice  
14 establishment and by also making certain that no segment  
15 of society is barred from participating in the criminal  
16 justice system.

17 To that end, the requirement protects only  
18 those groups that are perceived by themselves and others  
19 as distinct in the community, a distinct segment of that  
20 community. The exclusion of jurors who share a single  
21 attitude, I submit to this Court, does not threaten,  
22 does not threaten the democratic function of the jury  
23 and thus raise the constitutional issue.

24 Attitudes, unlike the characteristics that  
25 underlie the recognized groups that this Court has



1 identified in cross-sectional cases, are subject to  
2 change. It's been firmly established that the number of  
3 Witherspoon excludibles in the population is dwindling.  
4 The facts indicate that Witherspoon excludibles are not  
5 a fixed class, that they vary in characteristics by  
6 which they are identified, and that that variance is  
7 subject to change.

8 The classification of Witherspoon excludibles  
9 as a group on the basis of attitude alone is vastly  
10 different from those traditional classification  
11 characteristics as sex or origin or race.

12 QUESTION: May I ask, Mr. Attorney General,  
13 there are two issues and they are independent, are they  
14 not, the cross-section issue and the impartiality  
15 issue?

16 MR. CLARK: Yes, Your Honor, there are two  
17 issues.

18 QUESTION: You're going to address the -- I  
19 gather we could disagree with the Court of Appeals on  
20 the cross-section issue and yet find merit on the  
21 impartiality issue?

22 MR. CLARK: Yes, Your Honor, you could. I  
23 think the Court of Appeals merged the two issues, Your  
24 Honor. They merged the issues of impartiality and  
25 cross-section and said they found that these jurors

1 weren't impartial, therefore a cross-section violation.  
2 But they are two very distinct issues.

3 Moreover, this Court has made it clear that  
4 even if the defendant demonstrates a prima facie case of  
5 cross-section violation, a state is entitled to defend  
6 its jury selection process by showing it has some  
7 significant state interest in that process. That  
8 threshold point is that the state has a significant  
9 interest in Arkansas in utilizing the same jury to make  
10 the death penalty decisions.

11 That interest is really not quantifiable, but  
12 in fact it is real. It is real predicated on seven  
13 decades of belief both in history and tradition and a  
14 judgment in terms of policy, of common sense, that  
15 juries in our state represent an ability to be that  
16 safeguard, that check, if you will, on that criminal  
17 justice establishment, and sitting as a jury that they  
18 are best able, sitting as the same jury, having to know  
19 that they bear the responsibility of adjudicating guilt  
20 as well as punishment, that they are best able to make  
21 that awesome decision of life or death.

22 This Court has recognized that the state has  
23 broad discretion in fashioning its own jury selection  
24 procedures, and that the state must have some leeway in  
25 prescribing the qualifications relevant to jurors and

1 provide a means for reasonably exemptions. The goal of  
2 a fair cross-section is never achieved at the cost of  
3 leaving disqualified jurors on a jury.

4 For all the reasons that I have argued to the  
5 court above, I would ask that the decision below be  
6 reversed, and I'd like to reserve the remainder of my  
7 time for rebuttal.

8 CHIEF JUSTICE BURGER: Mr. Gross.

9 ORAL ARGUMENT OF SAMUEL R. GROSS, ESQ.,

10 ON BEHALF OF RESPONDENT

11 MR. GROSS: Mr. Chief Justice, may it please  
12 the Court:

13 I'd like to begin by saying a few words about  
14 the jury selection in Mr. McCree's case. The jury I  
15 believe was drawn from Ouachita County only, contrary to  
16 General Clark's assertion.

17 At the very beginning of the case, the judge  
18 read to the jury the information charging Mr. McCree  
19 with capital murder. With that in mind, the judge  
20 questioned the jurors about their ability to be fair and  
21 impartial in deciding the facts of the case and in  
22 rendering the verdict, and none of them had any  
23 difficulty with that.

24 After that was completed, the jurors were  
25 questioned individually and at length about their

1 ability to consider imposing the death penalty on Mr.  
2 McCree if a penalty determination became necessary. And  
3 at that point eight jurors were excluded solely because  
4 they would not consider imposing the death penalty if a  
5 penalty determination became necessary.

6 They were not questioned any further about  
7 their ability to be fair and impartial on guilt or  
8 innocence. They were not challenged on that ground.  
9 Nobody expressed any doubts about their ability to be  
10 fair and impartial on guilt or innocence.

11 That is the jury that Mr. McCree received.  
12 The jury that Mr. McCree is asking for is not any  
13 special jury, not any jury for capital cases, not a jury  
14 that consists of the type of people he particularly  
15 likes, but an ordinary criminal jury, the same jury that  
16 tries 99 percent of criminal cases in Arkansas and  
17 throughout the country, the jury that he would have  
18 received if the prosecutor in his case had charged him  
19 with non-capital murder.

20 And the question here is what difference does  
21 it make that he received a death qualified jury instead  
22 of an ordinary criminal jury?

23 Mr. Clark said that we are questioning the  
24 policy of the state. We are not. We are arguing that  
25 the use of this jury, because it is so different from an

1 ordinary criminal jury, violates the Constitution, it  
2 violated Mr. McCree's Sixth Amendment right to a fair  
3 and impartial jury, it violated his Fourteenth Amendment  
4 right to a trial on guilt or innocence under the due  
5 process clause.

6 QUESTION: Mr. Gross, you used the expression  
7 "ordinary jury." I would like to have a little bit  
8 better idea of what you mean by that. I understand from  
9 General Clark that ex-felons are excluded from Arkansas  
10 juries. Now, if the same sort of a survey was run among  
11 ex-felons in Arkansas as was run about Witherspoon  
12 excludibles' attitudes in this case and it were found  
13 that ex-felons were more favorable to the defense than  
14 the typical citizen, would you think that gave you a  
15 constitutional argument that Arkansas had to include  
16 ex-felons on the jury?

17 MR. GROSS: No, Justice Rehnquist. I think  
18 Arkansas and the many states that follow the same policy  
19 have adequate justification for excluding ex-felons for  
20 a number of reasons, including the fact that these  
21 people have been adjudged, have been judged by proof  
22 beyond a reasonable doubt to have violated serious state  
23 laws and as a deprivation of civil rights, as a  
24 punishment imposed on them as a consequence of their  
25 violation.



1 I don't think there's any problem with that  
2 exclusion.

3 QUESTION: Well then, in your view is  
4 one that is simply made up of everyone of jury age, and  
5 then the state must show some justification for  
6 excluding any category?

7 MR. GROSS: There are other exclusions that  
8 are permissible. The ordinary jury is the jury he would  
9 have received in a non-capital murder case, and beyond  
10 that the state must establish that the jurors cannot be  
11 fair and impartial in determining the questions before  
12 them, yes, Your Honor.

13 QUESTION: What if, instead of -- what if you  
14 had conducted a similar survey just in Arkansas alone of  
15 Witherspoon excludibles and it showed that people from  
16 Little Rock were much more inclined to vote for the  
17 defense in a capital case than people from Camden.  
18 Would that give you a right to argue that  
19 constitutionally you ought to have a jury made up from  
20 the entire state, rather than just from Camden?

21 MR. GROSS: No. The Constitution provides,  
22 the Sixth Amendment provides, for a local jury, a jury  
23 from the vicinity in which the crime took place. Now,  
24 the definition of the locality varies.

25 QUESTION: That was made for federal purposes,

1 really, the Sixth Amendment.

2 MR. GROSS: That's correct, that's correct.  
3 And the definition could vary and may well. It may well  
4 mean no more than that the jury has to be from the state  
5 in which the crime took place. But I don't believe that  
6 there's any constitutional restriction on the state's  
7 ability to define the geographical unit within which the  
8 trial jury is selected.

9 QUESTION: Mr. Gross, what if by chance there  
10 were no Witherspoon excludibles on the jury panel?

11 MR. GROSS: Then there would be no  
12 constitutional violation. If none were excluded, there  
13 would be no constitutional violation.

14 QUESTION: But by your terms it wouldn't be a  
15 fair cross-section, I suppose, as I understand your  
16 argument.

17 MR. GROSS: The fair cross-section argument,  
18 of course, goes to the systematic exclusion of  
19 Witherspoon excludibles from the group that is eligible  
20 for service. It wouldn't be a constitutional violation  
21 in a particular case in which the issue wasn't  
22 presented.

23 QUESTION: And you would say that it was a  
24 fair and impartial jury, even if by chance there were no  
25 Witherspoon excludibles on the jury?

1                   MR. GROSS: Yes. We agree with the state and  
2 with many decisions of this Court that a defendant is  
3 not entitled to the representation of any particular  
4 group on his particular trial jury. He is entitled to a  
5 jury that is selected without any systematic exclusion  
6 of groups, and in this case of a distinctive and  
7 important group.

8                   QUESTION: What you really are arguing for is  
9 a sort of prophylactic rule.

10                  MR. GROSS: It's a prophylactic rule, but one  
11 that has actual consequences in quite a few cases, Your  
12 Honor. There will be cases in which the jury would have  
13 been just the same.

14                  In the evidence in this case, there is a study  
15 of actual voir dire transcripts in Arkansas capital  
16 cases, and that shows that the number of Witherspoon  
17 excludibles ranged from zero in some cases to 20 in  
18 other cases. In those cases in which it was zero, then  
19 there was no prejudice. In those cases in which there  
20 was many, the prejudice may have been quite great.

21                  What we are arguing is against a rule of  
22 systematic exclusion in all cases.

23                  The question -- I want to address three major  
24 points in this argument. The first I've already  
25 mentioned, and that is that McCree is not asking for any

1 special procedure in capital cases, but for the same  
2 impartial jury that all non-capital defendants receive.

3 The second is that there is no serious  
4 disputes about the facts in this case. There is no  
5 serious question on the exhaustive record that was  
6 presented in the district court and on the findings of  
7 the district court, which were affirmed by the circuit  
8 court, that death qualification produces juries or guilt  
9 and innocence that are less representative, less  
10 deliberative, and less impartial than ordinary juries.

11 Third, that there is no state interest that  
12 justifies or requires this extraordinary procedure.

13 QUESTION: There was no finding, was there, of  
14 bias on the part of any single juror?

15 MR. GROSS: No, Your Honor, no.

16 QUESTION: So you're relying primarily on the  
17 statistical and expert testimony?

18 MR. GROSS: We're not -- that's correct, Your  
19 Honor. We're not suggesting that any juror who served  
20 should have been excluded. We're addressing the point  
21 that Justice Stevens raised earlier, that a jury that  
22 consists completely of individual jurors, each of whom  
23 could be fair and impartial, as a group will not be fair  
24 and impartial if it doesn't represent the community, and  
25 in particular in this case if it deviates from the sense

1 of the community in a particular direction, in this case  
2 to the detriment of the defense.

3 QUESTION: Does the state of Arkansas provide  
4 under certain circumstances that a person may be  
5 sentenced to life without benefit of parole?

6 MR. GROSS: Yes. That was the sentence that  
7 Mr. McCree received.

8 QUESTION: Yes, but let's forget capital cases  
9 for the moment. Some states do have provisions with  
10 respect to certain crimes that a jury may sentence for  
11 life without benefit of parole.

12 MR. GROSS: I'm not aware of any Arkansas  
13 provisions for that sentence except in capital cases.

14 QUESTION: But assume there are states that  
15 have it.

16 MR. GROSS: Yes, there are, I know that.

17 QUESTION: I think there are.

18 MR. GROSS: I believe so.

19 QUESTION: I think Texas may be one of them.

20 In such a state, would the same argument you  
21 make here with respect to death-prone jurors, as that  
22 term is used, apply to jurors who, responding to  
23 questions from the court, said they couldn't possibly  
24 agree that anyone could be sentenced for life without  
25 benefit of parole?



1 MR. GROSS: I jurors like that were excluded  
2 from the determination of guilt or innocence in a state  
3 that uses jury sentencing for that purpose, for  
4 determining life without parole, Your Honor? That's a  
5 theoretical possibility, but I think no more than that,  
6 for two reasons.

7 First, this is a rare occurrence. It's rare  
8 that this practice exists and few states have jury  
9 sentencing outside of capital punishment, and it's rare  
10 that people are excluded for opposition to any penalty  
11 other than death.

12 Second, not only is there no evidence that  
13 other attitudes about punishment have the  
14 distinctiveness and the importance that death penalty  
15 attitudes have; the evidence in the record here  
16 indicates the opposite.

17 QUESTION: But would such a jury be a  
18 cross-section of the community under your argument?

19 MR. GROSS: It would be a cross-section of the  
20 community unless there were a demonstration that the  
21 group that were excluded were important and distinctive  
22 enough to have a material bearing on the process of jury  
23 deliberations and on jury outcomes.

24 QUESTION: What do you have to do, have a  
25 Gallop poll to determine what percentage of the people

1 in the community would oppose life sentences without  
2 benefit of parole?

3 MR. GROSS: You'd at least have to determine  
4 that it is a substantial number. And beyond that, you'd  
5 have to show that these people have something to  
6 contribute that might make a difference to jury  
7 deliberations or the outcome of jury deliberations.

8 QUESTION: For example?

9 MR. GROSS: For example, as the Witherspoon  
10 excludibles in this case as have been shown, these  
11 people have legitimate and distinctive attitudes on  
12 issues such as the meaning of proof beyond a reasonable  
13 doubt. It's also been shown, and I think it's very  
14 significant, that juries that include Witherspoon  
15 excludibles have a better memory of the facts of the  
16 case, that juries that include Witherspoon excludibles  
17 are more critical of the testimony of the witnesses on  
18 both sides.

19 And of course, the evidence shows abundantly  
20 that juries that include Witherspoon excludibles are  
21 less likely to convict the defendant as charged and more  
22 likely to acquit or in many cases return a verdict of a  
23 lesser included offense.

24 Now, that sort of showing, I submit, has not  
25 only not been made with respect to other groups, but is

1 very unlikely, and the reason I say that is that the  
2 eviience in the record does not only have an absence of  
3 evidence on other attitudes; there are studies in the  
4 record and there is a chapter of a comprehensive study  
5 of jury behavior in the record which examined the impact  
6 of other characteristics, other attitudes, other  
7 demographic characteristics on jury behavior, and found  
8 the death penalty attitudes are uniquely predictive,  
9 that nothing else has the type of impact on jury  
10 behavior and jury deliberations that death penalty  
11 attitudes have.

12 QUESTION: Would you approve of the Florida  
13 system, under which the jury may or may not recommend  
14 capital punishment, and the judge may make the decision  
15 with respect to, the final decision with respect to  
16 capital punishment?

17 MR. GROSS: Personally, I have no particular  
18 position on it. It certainly is constitutional under  
19 this Court's decision in Spaziano versus Florida, and it  
20 could obviate the problem here, because --

21 QUESTION: Yes, but the case you're arguing is  
22 constitutional under Gregg, and it is the law in the  
23 majority of the states.

24 But coming back to Florida, I think I've read  
25 statistical showings that judges are more prone to

1 impose capital punishment in the state of Florida than  
2 the juries.

3 MR. GROSS: That's correct, Your Honor, and  
4 they sometimes override jury recommendations for mercy  
5 and impose the death penalty. In those cases, however,  
6 the Florida Supreme Court is particularly meticulous in  
7 its proportionality review, and it has reversed a fair  
8 number of those death sentences.

9 But to get to your --

10 QUESTION: Doesn't that cut against your basic  
11 argument, that so-called death-prone jurors in fact are  
12 more willing to impose capital punishment than judges,  
13 for example?

14 MR. GROSS: No, Your Honor.

15 QUESTION: You don't think so?

16 MR. GROSS: No, Your Honor. Our argument is  
17 not that death-prone -- that the jurors who now qualify  
18 to sit in Arkansas are more likely to sentence to death  
19 than those who are excluded. We concede what  
20 Witherspoon excludibles should not sit to determine the  
21 issue of penalty.

22 Our argument is that --

23 QUESTION: Would you argue that in Florida the  
24 people who would not be willing to recommend capital  
25 punishment should not be excluded?

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MR. GROSS: Yes.

QUESTION: You would?

MR. GROSS: They should not be excluded from

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QUESTION: Even though the ultimate decision is to be made by a court?

MR. GROSS: They should not be excluded from the determination of guilt or innocence. And I want to make a very basic point in response to Your Honor. Our argument is that this practice biases the determination of guilt or innocence. The defendant's right to a fair and impartial jury determination of guilt or innocence is more basic and more important than any defendant's right to any particular procedure at the stage of penalty.

A fair and impartial determination of guilt or innocence is an absolute constitutional precondition to the state's right to sentence the defendant to anything -- life without parole, death, or a \$100 fine. And the problem here is that by excluding people who would be ineligible to serve at the penalty determination, the state has biased the determination of guilt or innocence

QUESTION: Mr. Gross, if you're right then I suppose any state which allowed the state to make



1 peremptory strikes of jurors would have violated the  
2 Constitution if it tried to strike from the jury people  
3 that the state thought would be more likely to render a  
4 defense verdict.

5 MR. GROSS: No, Your Honor.

6 QUESTION: Why not, if the state tries to  
7 exercise all of its peremptory strikes in such a way as  
8 to get a jury that's more likely to convict?

9 MR. GROSS: Your Honor, that is an evenhanded  
10 aspect of the adversary system. In the state of  
11 Arkansas, the prosecutor does and the prosecutor in this  
12 case did exercise peremptory challenges to the best of  
13 his ability to try to obtain a jury that would most  
14 favor his side, and the defense attorney tried to do the  
15 same on the other side.

16 The problem here -- one of the problems, but  
17 not the only one, is that in addition to that, before he  
18 got to that stage, the prosecutor could systematically  
19 exclude all of the people who would not consider  
20 imposing the death penalty.

21 And that's not the only problem. There's an  
22 additional problem because these exclusions were done by  
23 law, by the judge, under sanction of state law. And  
24 there's yet another problem --

25 QUESTION: Well, I suppose the defendant can

1 also at the time of trial selection, in asking that  
2 jurors be excused for cause, have the defendant's  
3 counterbalancing excuses for cause, can't he?

4 MR. GROSS: On the issue of capital  
5 punishment? Yes, the defendant can. The defendant can  
6 exclude people who say that they would not consider any  
7 punishment other than death.

8 As it happens, the evidence here shows  
9 unambiguously that such people are exceedingly rare.  
10 The findings of the district court and of the Court of  
11 Appeals on this are that the exclusion of those people  
12 contributes only to the appearance of justice and not to  
13 the actuality of justice.

14 QUESTION: Would you consider a jury to be  
15 non-representative in, let's say, the District of  
16 Columbia, where overwhelmingly the people living in the  
17 District of Columbia are Government employees? Now, if  
18 the majority of a given jury is not made up of -- if a  
19 given jury is not made up of a majority of Government  
20 employees, then is it representative of the community in  
21 your view?

22 MR. GROSS: If a given jury is not  
23 representative of the community, there is no problem,  
24 because, as this Court has repeatedly said, the  
25 defendant doesn't have a right to a particular jury

1 panel, to twelve jurors who mirror the community. If  
2 the jury panel does not represent the community, then  
3 the question becomes is the difference between the jury  
4 panel, between the pool from which jurors are selected  
5 and the community, the type of difference which gives  
6 rise to a constitutional violation. And that --

7 QUESTION: Washington, D.C., has more lawyers  
8 per square city block or square mile than any city in  
9 the world.

10 MR. GROSS: Perhaps more judges, too, for that  
11 matter.

12 (Laughter.)

13 QUESTION: Did you ever hear of a lawyer on a  
14 Washington jury?

15 MR. GROSS: I don't know if they ever serve on  
16 Washington juries, Your Honor. But assume they don't.  
17 I have no quarrel with occupational exclusions. This  
18 Court in its decisions in Taylor and in Duren  
19 specifically said that states are free to prescribe  
20 occupational exclusions, and I think what that --

21 QUESTION: But there's no occupational  
22 exclusion of lawyers.

23 MR. GROSS: Oh, then it's a de facto  
24 occupational exclusion.

25 QUESTION: Nor doctors.

1 MR. GROSS: Some states exclude or, more  
2 likely, provide exemptions for doctors and lawyers as a  
3 matter of statute, and in some places particular  
4 occupational groups for one reason or another don't  
5 happen to show up. They get exemptions for hardship or  
6 whatever.

7 I don't have any problem with that, as this  
8 Court didn't in its previous decisions. And I think the  
9 Court's statements on that reflect a judgment that there  
10 is no basis for presuming that doctors or lawyers of  
11 medical health professionals in general, unlike women,  
12 unlike blacks, have a distinctiveness that makes their  
13 inclusion in jury panels important.

14 It is theoretically conceivable that one could  
15 demonstrate that they have that sort of distinctiveness,  
16 but in fact I believe the evidence, the evidence in this  
17 case, shows the opposite.

18 QUESTION: Mr. Gross, may I ask, if the Court  
19 should disagree with the Court of Appeals on the  
20 cross-section issue, would you have a different argument  
21 to make on the impartiality question?

22 MR. GROSS: I believe, Your Honor, that the  
23 Eighth Circuit's position on the cross-section issue  
24 and the Eighth Circuit's findings on which it based its  
25 decision on the cross-section issue dictate a holding

1 from this Court on the issue of impartiality as well.  
2 The Eighth Circuit found that --

3 QUESTION: Is that to say that if we disagree  
4 with the Court of Appeals on the cross-section issue, we  
5 also disagree with the Court of Appeals on the  
6 impartiality issue?

7 MR. GROSS: No, indeed.

8 QUESTION: Well, that's what I'm trying to get  
9 at.

10 MR. GROSS: I'm sorry, I misunderstood your  
11 question.

12 QUESTION: If we should disagree with the  
13 Court of Appeals on the cross-section issue, what  
14 argument have you on the impartiality issue?

15 MR. GROSS: The Court on formal grounds could  
16 disagree with the Eighth Circuit that this group is not  
17 what has been called a distinctive or cognizable group.  
18 Nonetheless, the findings of the district court and the  
19 findings of the Eighth Circuit show that the exclusion  
20 of this group has an actual biasing effect. And  
21 regardless of the distinctiveness of this group --

22 QUESTION: That's on the guilt-innocence?

23 MR. GROSS: That's correct, but not only on  
24 guilt or innocence, also on the predisposition of the  
25 jury prior to the initiation of deliberations, which is



1 I submit a constitutional issue in itself, and also on  
2 the conduct of deliberations.

3 QUESTION: Well, Mr. Gross, now, you say it  
4 has an actual biasing effect, and we're not talking  
5 about cross-section. You agree that no individual juror  
6 was biased?

7 MR. GROSS: That's correct, Justice  
8 Rehnquist.

9 QUESTION: So you're saying that a jury can be  
10 biased even though no individual juror on it is biased?

11 MR. GROSS: Exactly.

12 QUESTION: You're really saying the absence of  
13 these other people is what really biases the jury.

14 MR. GROSS: That's right. This jury is not  
15 biased because any individual on it was unqualified.  
16 It's biased because it's skewed. Let me give you an  
17 example.

18 QUESTION: You think if it hadn't have been  
19 for this exclusion conviction would have been less  
20 likely?

21 MR. GROSS: The conviction may have been less  
22 likely. I think the most likely effect is that the  
23 finding that the murder in this case occurred in the  
24 course of a robbery wouldn't have been returned. The  
25 evidence of the existence of a robbery in Mr. McCree's

1 case was entirely circumstantial.

2 If a jury had not believed that the state had  
3 proven the existence of a robbery beyond a reasonable  
4 doubt, then Mr. McCree could not have been sentenced to  
5 life without parole or to the death penalty. And a  
6 different jury could reasonably have reached a different  
7 conclusion on that issue, or on other issues.

8 Let me say something about the effect here and  
9 how it indicates fairness. There are many studies in  
10 the record here, but the effect here is not simply one  
11 that is known through studies. It is well known in the  
12 legal community.

13 Let me give you an example, if I may. In a  
14 brief amicus curiae submitted by the Dean of the  
15 University of Missouri at Kansas Law School and by a  
16 Jackson City prosecutor, they cite a section of a manual  
17 prepared by the Missouri Attorney General's office which  
18 says:

19 In the hands of a prepared state's attorney,  
20 the death penalty jury selection process, as in no other  
21 type of criminal case, holds the ultimate weapon, the  
22 edge for maximum success. The voir dire in death cases  
23 gives you, the prosecutor, certain unique opportunities  
24 to apply effective tactics which are unavailable in  
25 other criminal cases."

1                   And this is not the only time prosecutors have  
2 admitted that they are aware of this. I don't think  
3 there's any secret about the effect that we have here.  
4 The effect is that the prosecution, by asking for the  
5 death penalty, can increase its chances of getting a  
6 conviction beyond what they would have been in the same  
7 case if the prosecution had not asked that the defendant  
8 be executed.

9                   And we submit that that's unconstitutional.

10                  QUESTION: Do you think you have destroyed the  
11 impartiality of a jury if the prosecutor is permitted  
12 one way or another to exclude people whose members of  
13 the family have been convicted of felonies?

14                  MR. GROSS: People whose members of family  
15 have been convicted? That's possible. Again, that  
16 would depend. That strikes me as an overbroad exclusion  
17 if the purpose is the same purpose for which states  
18 exclude felons themselves. I'm not aware of any state  
19 that permits anything of this sort.

20                  QUESTION: What use is made of the peremptory  
21 challenge if they can't challenge for cause in those  
22 cases? Do you think a juror -- or the defense, for  
23 example -- do you think defense counsel wants people on  
24 the jury whose members of families are working in the  
25 prosecutor's office, for example?

1 MR. GROSS: No, indeed. But as this Court  
2 held in --

3 QUESTION: Or who have ever been prosecutors?

4 MR. GROSS: I actually know of cases in which  
5 defense attorneys have permitted that, but typically  
6 not. But that enough, as this Court has held in Smith  
7 versus Phillips, is not enough to impute bias to a  
8 juror. A showing of actual bias has to be made or  
9 peremptories can be exercised.

10 But peremptories are balanced, and this is an  
11 unbalancing process.

12 QUESTION: Did I misunderstand your brief to  
13 argue that at the voir dire a prosecutor should not  
14 inquire of the guilt-innocence, potential  
15 guilt-innocence juror, anything about his attitudes  
16 towards the death penalty?

17 MR. GROSS: That would avoid all of the  
18 problems that we've identified.

19 QUESTION: You mean that it would be  
20 unconstitutional, do you think, if the prosecutor said,  
21 would you be willing to impose the death penalty, and he  
22 said, no, in no circumstances; well, you, despite your  
23 attitude toward the death penalty, would you believe  
24 that would affect your deliberations on guilt or  
25 innocence? Can't he ask that?

1 MR. GROSS: I see what you're saying. That  
2 might create a small portion of the problem that we have  
3 here, because one of the problems we have here is --

4 QUESTION: You don't suggest that there are no  
5 people who are against the death penalty who would also  
6 not vote for guilt?

7 MR. GROSS: No, there certainly are.

8 QUESTION: Well, how does a prosecutor  
9 identify them without asking them?

10 MR. GROSS: Well, there are a couple of  
11 possible procedures. There are several. But the one  
12 that was used in this case was a general voir dire by  
13 the judge, asking all the jurors, knowing that it was a  
14 capital case, if they would be fair and impartial on  
15 guilt or innocence. The state --

16 QUESTION: You don't object to that?

17 MR. GROSS: Not at all. The state could  
18 permit prosecutors to go beyond that and engage in more  
19 extended inquiry on that issue, on the issue of  
20 nullification or guilt or innocence. Increasingly, I  
21 believe state courts have tended to limit that type of  
22 voir dire, but I don't see any constitutional obstacle  
23 to it.

24 QUESTION: Suppose that the challenge for  
25 cause were eliminated just because of the opposition to



1 the death penalty. Couldn't a prosecutor at least on  
2 voir dire identify those people who are opposed to the  
3 death penalty, so that he might exercise his  
4 peremptories against them?

5 MR. GROSS: A state could permit that. It's  
6 not required constitutionally.

7 QUESTION: Well, I know, but it wouldn't be  
8 barred constitutionally?

9 MR. GROSS: No, I don't believe it would, Your  
10 Honor. I think one of the problems we've identified --  
11 and I think Your Honor has that in mind -- is that the  
12 process of asking questions about willingness to  
13 consider imposing the death penalty before a  
14 determination of guilt is in itself biasing. That could  
15 be minimized.

16 But even if it were left as it is -- and I  
17 don't think it would under any ruling upholding the  
18 Eighth Circuit -- that process alone may not give rise  
19 to a constitutional violation. That process, together  
20 with all of the other problems we have here, I think  
21 certainly does.

22 I'd like to say that, as the Court knows, this  
23 issue is not entirely new. When the Court first  
24 addressed it in 1968 in the Witherspoon case, I think  
25 most lawyers and most judges believed that death

1 qualification violates -- or rather, creates biased  
2 juries on guilt.

3 But the Court decided not to act on that  
4 belief, to defer a decision. And that was appropriate  
5 then, because it was not proven. Now matters have  
6 changed. It has been proven. The evidence of it is  
7 overwhelming, it's uncontroversial, and it's well  
8 known.

9 And at this point, now that we know that death  
10 qualified juries are biased on guilt or innocence, to  
11 permit the practice to continue would be a very  
12 different matter and it would, I submit, be  
13 unconstitutional.

14 QUESTION: Do you have a -- do you take any  
15 position that if you win, whether the ruling would be  
16 retroactive?

17 MR. GROSS: I have no position on that as an  
18 advocate for Mr. McCree. But obviously it's of concern  
19 to the Court. The best I can say on that for the  
20 Court's information is, a brief was filed on this on  
21 behalf of Mr. Woodard which suggests a number of ways in  
22 which retroactivity could be limited, and I think it  
23 could.

24 Contrary to what General Clark said, I think  
25 only a small minority of the people who are on death row

1 now would have relief available to them under this  
2 Court's ruling in *Wainwright v. Sykes*. I should point  
3 out, as the Court very likely knows, that Judge Eisele,  
4 the district court judge in this case, already dismissed  
5 one petition on this issue because the issue was not  
6 preserved in the state courts, and the Eighth Circuit  
7 has done that in two other cases.

8 Judge Eisele also suggested that the doctrine  
9 of *Wainwright v. Sykes* might prohibit applying this type  
10 of relief to defendants who raised the issue but did not  
11 present any evidence on it, since it had been identified  
12 as a factual issue.

13 So I suspect the number of people to whom it  
14 would apply under existing Court doctrine would be quite  
15 small, and it could be limited beyond that, and it could  
16 be made non-retroactive entirely.

17 Thank you.

18 CHIEF JUSTICE BURGER: Do you have anything  
19 further, Mr. Attorney General?

20 REBUTTAL ARGUMENT OF

21 JOHN STEVE CLARK, ESQ.,

22 ON BEHALF OF PETITIONER

23 MR. CLARK: Mr. Chief Justice and may it  
24 please the Court:

25 I will be very brief. It's important to note

1 for this Court that the state has not moved to exclude  
2 Witherspoon excludibles because of their attitude as to  
3 the death penalty, but instead because they will not  
4 follow state law.

5 The Sixth Amendment says that you're entitled  
6 to an impartial jury, that is one that will fairly weigh  
7 the evidence presented, the arguments of counsel,  
8 consider the instructions of the Court, and apply that  
9 law to the facts and the case.

10 QUESTION: But General Clark, is it not  
11 correct that the state agrees that there is a  
12 substantial percentage of Witherspoon excludibles who  
13 could follow state law on the issue of guilt or  
14 innocence?

15 MR. CLARK: Your Honor, we would consent that  
16 if a juror says, who is a Witherspoon excludible, I can  
17 follow state law, that you can't strike them for cause  
18 on that reason. We've never argued that point. If that  
19 juror says I will follow state law, fine. We may strike  
20 him peremptorily, but for cause we don't have that  
21 issue.

22 But McCree argues to this Court that in fact  
23 --

24 QUESTION: Well, yes, but what if he says, I  
25 will follow state law except with respect to capital

1 punishment?

2 MR. CLARK: Then he must be excused for cause  
3 because --

4 QUESTION: Well, but he says, I can decide  
5 guilt or innocence very fairly and not be affected at  
6 all by my views about the death penalty.

7 MR. CLARK: The policy, Your Honor, of our  
8 state is for the same jury to hear guilt and innocence  
9 as well as penalty, and that policy I submit to you is  
10 one that is founded in good constitutional principle.

11 Secondly, I would argue to this Court that,  
12 though the contention may be made that McCree's attack  
13 -- really, the contention should be made that McCree's  
14 attack is on the procedure. McCree's attack is that we  
15 just don't like this system, not that it's  
16 unconstitutional, we think there's a better way.

17 In looking at that attack and particularly in  
18 viewing it with the issue of whether these death  
19 qualified juries are distinct as compared to all other  
20 ordinary criminal juries, that is factually inaccurate.  
21 In Arkansas, when we qualify a jury in a criminal case  
22 we repeatedly -- whether it's a drug case, it's a  
23 robbery case, it's a theft case, it's a rape case, or  
24 it's a death case, we want to know if those jurors can  
25 consider the full range of punishment.



1           If they cannot, then we submit that they must  
2 be excused for cause.

3           QUESTION: But you agree, I take it, that the  
4 jurors we're talking about here, the 17 percent or  
5 whatever the figure is, would all be qualified to sit in  
6 all of those cases if they were not capital cases?

7           MR. CLARK: They would be qualified in those  
8 cases if they stated to the court, Your Honor, they  
9 would consider the full range of punishments.

10          QUESTION: But they also state to the court in  
11 these cases, the death cases, that they can pass on  
12 guilt or innocence without any disability, and you agree  
13 with that as I understand it.

14          MR. CLARK: Some may state that, yes, Your  
15 Honor. In fact, some have, that they could do guilt or  
16 innocence, but not penalty.

17          QUESTION: Well, does it boil down to the  
18 balancing between the state's interest in the unitary  
19 system in capital cases as opposed to this proven, as I  
20 understand the record, conviction proneness of this  
21 particular jury? Is that what we're balancing?

22          MR. CLARK: You are balancing state interests,  
23 Your Honor. I think that is correct. And if in fact  
24 there is a conviction proneness, there may be an  
25 acquittal proneness.

1                   What the issue is in the Sixth Amendment is,  
2 do you get a jury who will follow state law? If they  
3 submit to you that they will, then in fact our unitary  
4 system is constitutional.

5                   QUESTION: Of course, under the Eighth Circuit  
6 holding you could have the best of both possible worlds,  
7 because it follows state law or guilt or innocence, and  
8 then you just have to have a few extra alternates on.  
9 You have to give up your state policy as to a few of the  
10 jurors in a small segment of the cases.

11                   MR. CLARK: I would submit to this Court that  
12 that is not the best of all worlds, at least by the  
13 policy determination in Arkansas, that to set those  
14 alternates on the jury, which we set, too, but not in  
15 the deliberation phase, in case of illness or emergency,  
16 but to divide that responsibility, to diminish that  
17 responsibility, is not good policy, and that we have  
18 determined it not to be good policy.

19                   And the remedy fashioned is really a policy  
20 consideration, not a constitutional violation. In  
21 addition, I make one other point to the Court --

22                   QUESTION: Well, may I also ask, is the state  
23 interest a matter of policy or is there any  
24 constitutional right to this? Is there any  
25 constitutional guarantee that you can't protect yourself

1 by adequate peremptories or use of alternates, for  
2 example?

3 It seems to me you're saying you have a policy  
4 at stake.

5 MR. CLARK: Yes, sir, I do.

6 QUESTION: They're saying they have a  
7 constitutional interest in an impartial jury, and that  
8 they're not getting an impartial jury. Are they  
9 weighing a constitutional claim against your policy  
10 interest, that's what I'm trying to --

11 MR. CLARK: Your Honor, I submit that when  
12 they argue that they have a constitutional claim, their  
13 constitutional claim that's described by the  
14 Constitution is to an impartial jury.

15 QUESTION: Right.

16 MR. CLARK: In this instance, by the process  
17 that we follow we only exclude those jurors who say they  
18 cannot follow state law. Had one of McCree's jurors,  
19 one of the nine excluded, said, I can follow state law,  
20 we could not have excused him for cause. The record  
21 doesn't show they said that, Your Honor.

22 QUESTION: Yes, but you're recusing them from  
23 the portion of the proceeding in which they admittedly  
24 can follow state law, because they cannot follow state  
25 law in a later proceeding in which they admit they

1 should be excluded.

2 MR. CLARK: We are excusing them for that  
3 reason, Your Honor, and we do that because we think that  
4 jury deliberation is the better policy, rather than  
5 judge sentencing.

6 QUESTION: General, in this case did the  
7 Government use up all its peremptories?

8 MR. CLARK: Your Honor, I'm not aware of  
9 whether we did or not. I believe we did. There are ten  
10 for the Government in a capital case and twelve for the  
11 defendant, and I believe that we did.

12 QUESTION: You believe they did use them up?

13 MR. CLARK: She tells me we did not. I'm  
14 sorry, Your Honor.

15 QUESTION: You did not?

16 MR. CLARK: We did not.

17 One other point I would like --

18 QUESTION: Was the voir dire conducted  
19 individually?

20 MR. CLARK: Yes, Your Honor. First the court  
21 inquired, and the record I think indicates that six  
22 jurors immediately identified, because of their belief  
23 on the death penalty, they could not follow state law  
24 and were excused.

25 The three others that were excused were

1 identified because they could not follow state law and  
2 because at least two of those three had some  
3 relationship or familiarity with the defendant, which  
4 caused the state to be concerned about their  
5 objectivity.

6 QUESTION: So they excused six out of the  
7 entire panel?

8 MR. CLARK: Nine total, Your Honor, six  
9 immediately by the judge.

10 QUESTION: Yes. But the three, the other  
11 three, were because of individual questioning?

12 MR. CLARK: Yes, Your Honor.

13 The other point I would like to make to this  
14 Court --

15 QUESTION: I suppose if you had a rule that  
16 you cannot throw off Witherspoon excludibles, you cannot  
17 exclude them from the guilt or innocence phase, you  
18 would just -- you would find out if they were opposed to  
19 the death penalty, but then seat them. And then you  
20 could, when you had filled up the -- got your twelve  
21 jurors, you would add some alternates.

22 MR. CLARK: Your Honor, I think that procedure  
23 perhaps could be advanced.

24 QUESTION: I guess we just wouldn't know how  
25 many alternates you would have had to have on that basis



1 in this case.

2 MR. CLARK: We would not have known, Your  
3 Honor, that's correct.

4 QUESTION: We don't know now.

5 MR. CLARK: No, that's right.

6 The other point I would make to this Court is  
7 that there's a division in the legal community among  
8 prosecutors as to whether death qualifying a jury makes  
9 them conviction prone. There is evidence in the record  
10 from prosecutors in Arkansas that disagree with others  
11 as to the effect that qualifying a jury has in terms of  
12 their indication of adjudication of a verdict of guilt  
13 and innocence.

14 And finally, that if the state is not allowed  
15 to voir dire on the issue of death, as the question  
16 asked, then we are facing a jury that cannot be  
17 impartial to the state because of the potential of  
18 nullifiers, those very persons who, because of their  
19 opinion of the penalty of death, would vote for an  
20 adjudication of innocence rather than guilt, even though  
21 the state met its burden.

22 For all those reasons, I would ask that the  
23 decision below be reversed.

24 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
25 The case is submitted.

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(Whereupon, at 11:02 a.m., oral argument in  
the above-entitled case 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:

#84-1865 - A. L. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT CORRECTION,

Petitioner V. ARDIA V. MCCREE

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

BY Paul A. Richardson

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