ORIGINAL

In the

Supreme Court of the United States

RANDALL DALE ADAMS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 79-5175
	)	
TEXAS,	)	
	)	
Respondent.	)	

Washington, D.C.
March 24, 1980

Pages 1 thru 47

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RANDALL DALE ADAMS, Petitioner,	:	
v.	:	No. 79-5175
TEXAS, Respondent.	:	

Washington, D. C.,

March 24, 1980.

The above-entitled matter came on for oral argument at 1:17 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MELVYN CARSON BRUDER, ESQ., Bruder & Cooper, 2514 Cedar Springs, Dallas, Texas 75201; on behalf of the Petitioner

DOUGLAS M. BECKER, ESQ., Assistant Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in Adams v. Texas.

Mr. Bruder, you may proceed whenever you are ready.

ORAL ARGUMENT OF MELVYN CARSON BRUDE, ESQ.,
ON BEHALF OF THE PETITIONER

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

We are dealing in this case with the right of a state to exclude prospective jurors from a capital case solely because of their attitudes or feelings about the death penalty. By statute, that is section 1231(b) of the Texas Penal Code, Texas in our opinion has impermissibly broadened the base of exclusion beyond the parameters established by the Witherspoon doctrine. And to the extent that Witherspoon does not allow the exclusion of any juror because of personal feelings about the death penalty, unless there is unmistakable irrevocable commission on the part of the prospective juror to vote against death, 1231(b) impedes upon Witherspoon to the extent that it allows the exclusion of the juror for a reason less than that described in Witherspoon.

As proof of our position, we submit that any time a juror is qualified under Witherspoon and says I

can in a proper case and under the right circumstances vote death, whenever such a juror is excluded under state law solely because of the juror's feelings about capital punishment, the juror is excluded on a broader basis than provided in Witherspoon.

QUESTION: You are suggesting that there is a gray zone of some kind here where a juror, a prospective juror might be influenced by the fact that the death penalty was involved or, on the other hand, might not be?

MR. BRUDER: I'm suggesting that as long as the juror is willing to state "I can vote death in the right case," that juror is qualified vis-a-vis his feelings about the death penalty.

QUESTION: By the right case, taking that phrase, does that mean the right case as he sees it or the right case as within the framework of the instructions of the court?

MR. BRUDER: It means the right case under the evidence within the framework of the instructions given by the court and as he views the facts, because he is a personal representative of the community and it is he who must express the community conscience. And under the guarded jury discretions, that is specifically provided for under the Texas capital punishment scheme. The jury has the discretion to utilize what evidence and facts is

made available, and by answering the three questions, knowing what the effect of those answers explicitly is, the jury exercises that community conscience. Thus, Witherspoon requires that that base defined in Witherspoon apply to jury selection in the state of Texas.

Now, the state has constructed a theoretical model upon which it hopes to convince this Court that 1231(b) stands for a proposition that even the Texas Court of Criminal Appeals has disowned. The state argues and agrees with us that Witherspoon does apply in Texas. I take that to dispose of question number one under the grant of cert.

So we go to the next question, and the state argues that Witherspoon is not violated in this case and theoretically in any other case in Texas because the real purpose of 1231(b) is to exclude those jurors who are affected to the extent that they will allow their personal feelings to influence their vote, and that is not what 1231(b) says and that is not what the Texas Court of Criminal Appeals has construed 1231(b) to say. In fact, the Court of Criminal Appeals has said just the opposite.

A juror who states under oath "I will answer the questions honestly, I will answer the three punishment questions truthfully, I will put aside whatever reservations I may have about capital punishment when I

answer those three questions," that does not rehabilitate a prospective juror who has already said "I will be affected by the existence of the death penalty in this case."

So clearly the Court of Criminal Appeals has rejected what this Court suggested could exist in Lockett v. Ohio, that is that it is fair to excuse from jury service any prospective juror who says "I can't follow the law," and Witherspoon pretty much said the same thing.

QUESTION: How do you apply that to Juror White who was examined in the appendix at the upper pages, 20, 25, 27, somewhere in there?

MR. BRUDER: Juror White specifically qualified under Witherspoon on page 26 in our opinion. He was then asked on page 27, "May I from your answers -- are you saying that this mandatory sentence of death or life would affect your deliberations on the issues of fact in the case including those three questions" -- "Yes, sir." And then if you go on to pages 28 and 29 --

QUESTION: Didn't he have a little more there? Juror White said, "I think I believe in capital punishment, but I don't want to have anything to do with it. Is that clear?" Those are all his words.

MR. BRUDER: Yes, that's correct. That's correct.

QUESTION: Does that suggest that he doesn't want to impose it?

MR. BRUDER: It may suggest it, but I think that Juror White was not absolutely disqualified under Witherspoon. Juror White never indicated that there would be an automatic vote against death, and --

QUESTION: Look at his answer at the bottom of page 27 and the question and his answer at the top of page 28.

MR. BRUDER: It is still equivocal. And the important thing is that, on the one hand, the state says in its brief we really don't have to concern ourselves about the ultimate issue because the juror writes yes answers or no answers and it is the judge who sets the punishment. And at the same time Juror White says -- "Could you set aside your feelings and vote for the death penalty, either directly or indirectly?" "I guess I could. I guess I could." "You have to. You have to vote the question, the answers to the questions honestly, irregardless of what you think the penalty should be. Do you think you can do that?" "Yes." "If the facts and circumstances justified it?" "Yes."

So under state theory number one, Juror White is eminently qualified. But under state theory number two, which is inconsistent with number one, Juror White

is not qualified and it is difficult from an analysis of their positions to determine which theory it is that they want this Court to apply.

QUESTION: After the last answer of the juror that you have just referred to, Juror White said it would probably affect me in my deliberations, and then the judge said would it be fair then to say that you cannot give us your assurance that you would not be affected by the punishment of life or death in deliberating on the facts of this case. That is correct, the juror said. That is correct.

MR. BRUDER: Yes, sir. And the one thing that we have not addressed ourselves to at all in the briefs, perhaps not enough anyway, is the problem of the word "affect," and it is something which unfortunately the Court of Criminal Appeals has refused to address itself to.

What does the word "affect" mean? The statute doesn't define it. The courts won't define it. I think a fair reading of the appendix and a fair reading of the voir dire examination in this case clearly indicates that what happens is that a prosecutor defines it for the juror before asking him the critical question called for by 1231(b).

QUESTION: But both of the two questions just

asked you by the Chief Justice were posed by the court and not by the prosecuting attorney.

MR. BRUDER: I don't think it matters whether the court uses 1231(b) in violation of Witherspoon or whether it is the prosecutor. It is the defendant who is injured by a violation of Witherspoon, and just as in Witherspoon itself, it was the court who wholesale excluded jurors that voiced conscientious scruples against the death penalty.

QUESTION: Well, suppose all we had was the colloquy on page 28 of the appendix, the question by the court, "All right. Would it be fair then to say that you cannot give us your assurance that you would not be affected by the punishment of life or death in deliberating the fact issues in the case?" Juror White, "That's correct." Did you think --

MR. BRUDER: Does it rest on that?

QUESTION: That was the sole colloquy that the court had with Juror White or anybody else had with Juror White, do you think it would have been a violation of the federal Constitution to exclude Juror White for cause?

MR. BRUDER: Most assuredly. Juror White has not said anything which prevents Juror White from performing her duties under Texas law as a juror in a capital

case, unless you accept the validity of 1231(b) as being the end-all question to test the qualification of a juror.

QUESTION: What if the next question said though, what do you mean by affect. Well, I am very likely to be very sympathetic and in the case of a tie, if I am really in doubt, I am going to vote in favor of the defendant just because I am against the death penalty, would that add anything to you?

MR. BRUDER: It hurts me.

QUESTION: I know, but could the juror then be excluded?

MR. BRUDER: That makes all the difference in the world. That brings the case within Lockett, where the juror --

QUESTION: Then if the juror said -- if the juror had earlier said, well, I think I can answer the question as truthfully and faithfully without regard to my feelings about the death penalty, but ultimately had said what I just suggested he said, then his answers would be just inconsistent, wouldn't they?

MR. BRUDER: They would. They clearly would.

QUESTION: And yet you think it is not inconsistent between his earlier answers that he could answer these questions fairly and his later answer that, well, my opposition to the death penalty will affect my verdict.

You don't think that is inconsistent?

MR. BRUDER: I think they are inconsistent and I think the only solution is the same solution that the Fifth Circuit proposed in Burns v. Estelle, there must be continuing inquiry made of that juror to attempt to find out which of the inconsistent positions is the strong position. But --

QUESTION: This was the last one anyway, wasn't it, and it was the one that the Judge chose to believe?

MR. BRUDER: Juror White?

QUESTION: Yes.

MR. BRUDER: Wasn't the last juror, no.

QUESTION: I know, but this was the last question of Juror White.

MR. BRUDER: Yes.

Now, our position on 1231(b) is that it attempts to statutorily codify a single question which can be used to satisfy the Witherspoon standard, but it doesn't go far enough. What it should do is define affect. What it should do is come up with a second question or a second phrase, as suggested by Mr. Justice White, will this affect your deliberations to the extent that you will not vote honestly, that you will not follow the law, that you will not be truthful.

If 1231(b) said that or if the Texas Court of

Criminal Appeals elected to construe 1231(b) that way, then I think our position would be far, far weaker.

QUESTION: Do you think you should force a juror to say no, I will not be truthful? This is a little bit like a lot of the polling process, the answer is determined by the question if you put it the way you put it.

MR. BRUDER: I think the answers are determined by the questions in the voir dire examination in this case, very clearly, because if you have a person on the witness stand on voir dire examination, the pattern is the same in all of these cases, not only in the Adams case but in all of them. Mr. or Mrs. Juror, what is your feeling about the death penalty? I have some reservations about it. I know that the law provides for it, but I personally don't want to be involved. Well, our law provides that you have to answer this question. Now, taking into account your personal feelings against the imposition of the death penalty, the fact that you would not really want to participate in the decision-making process leading to the taking of a man's life, can you state under oath that that will not affect your deliberations?

I don't think any self-searching person is going to say anything but, of course it will affect my deliberations.

QUESTION: Well, does he belong on the jury?

MR. BRUDER: Without knowing what that person means, he certainly is not subject to exclusion, whether or not he --

QUESTION: Well, he certainly wouldn't have meant that I would be more likely to vote guilt because I am opposed to the death penalty. He couldn't have meant that.

QUESTION: Isn't the most likely meaning of affect the second question that Justice White put to you a moment ago, that it will affect in favor of resolving doubts in favor of the defendant, that he would not otherwise resolve under the judge's charge?

MR. BRUDER: No, I think the voir dire examination shows that a number of the veniremen questioned interpreted the word "affect" to mean a heightened sensitivity to the case. I would want to be sure. In other words, I am not going to treat this as a petty theft case. This is a capital case. We are talking about a man's life. And I take this to be a heightened sensitivity situation where I am going to respond carefully.

QUESTION: Well, do you think that has to be developed with any juror, that he is going to treat a death case differently from a petty theft case?

MR. BRUDER: Do I think it has to be developed?

QUESTION: Yes, do you think that needs to be developed the way you suggest it?

MR. BRUDER: Yes.

QUESTION: And then interpret the answers as merely expressing a heightened sensitivity?

MR. BRUDER: It is the only way to ascertain whether or not the juror interprets the word "affect" as meaning heightened sensitivity or interprets the word "affect" as meaning I can't follow the law. We have no --

QUESTION: Then how about Curtis Williams, page 32. The Court: "Would you be influenced by the death penalty part to keep you from voting yes?" The Witness: "I think I would be influenced by the death penalty." It sounds to me like he is saying yes, I would be influenced in a way that would keep me from voting yes. What do you think about that?

MR. BRUDER: I think, Your Honor, that Mr. Williams is a very weak example of our position.

QUESTION: What about a juror who is asked on voir dire about statutory questions and responds in favor of capital punishment but gives the same sort of affect answers and the defense challenges for cause? Now, would you say that the court could turn down that sort of a challenge because all he meant was that his

sensitivity was heightened?

MR. BRUDER: I'm not sure I follow the question. Are you saying that if the defense challenged for cause under 1231(b)?

QUESTION: Yes.

MR. BRUDER: Well, I don't think the challenge for cause exists in the law. I think 1231(b) provides for challenge for cause that is unconstitutional and it wouldn't matter who made the challenge, it would still be a violation of Witherspoon.

QUESTION: But certainly a defendant in Texas has challenges for cause, do they not?

MR. BRUDER: Certainly, but I --

QUESTION: And couldn't one of them be based on the way the particular venireman answered the three questions in the statute under consideration?

MR. BRUDER: Theoretically that is possible, but from a practical standpoint it has never happened to my knowledge. It certainly didn't happen in this case. And in the other 1231(b) cases that have been tried in Texas, it hasn't happened, according to people who have read those records and advised me. It has always been a prosecution, consistently.

QUESTION: Mr. Bruder, let me put it another way. Is it your position that 1231(b) will operate to

exclude prospective witnesses that the Witherspoon rule would not exclude?

MR. BRUDER: Exactly.

QUESTION: And that the Witherspoon rule said could not be excluded. That is what --

MR. BRUDER: Exactly.

QUESTION: That is what Witherspoon stood for.

MR. BRUDER: Exactly.

QUESTION: It held that jurors could not be excluded for cause on anything less than what was defined in Witherspoon.

MR. BRUDER: Once they meet the threshold test, they are allowed to go on that jury and cannot be struck for any reason which is based upon their personal feelings about the death penalty.

QUESTION: But Witherspoon didn't involve how it would affect their guilt or innocence vote, did it?

MR. BRUDER: Yes, it did.

QUESTION: I know, but it didn't say that it was wrong to exclude the juror if he conceded that it might make him more likely to vote for innocence.

MR. BRUDER: I think the second prong of the Witherspoon test recites that unless it is shown that the juror will never vote for death or that his feelings will cause him to vote a certain way on the issue of

guilt-innocence --

QUESTION: Right.

MR. BRUDER: -- he is then subject to exclusion.

QUESTION: It is less than cause him to vote a certain way. It said that his feelings would prevent him from making an impartial decision.

MR. BRUDER: An impartial decision, making him biased.

QUESTION: On the question of guilt or innocence.

MR. BRUDER: On the question of guilt or innocence. And what we deal with in application with respect to 1231(b) is that in almost every instance 1231(b) is aimed at the punishment questions and it is used to exclude jurors who cannot vote death. It is never used or rarely used in regards to their ability to fairly resolve the guilt-innocence issues.

QUESTION: Mr. Bruder, I want to be sure about one other thing. If the Court should decide in your favor here, what is the remedy? Does it go back for a new trial on guilt or innocence or merely on sentencing?

MR. BRUDER: Your Honor, the remedy as far as this Court is concerned is to vacate the judgment insofar as it imposes the death sentence. Under Texas law --

QUESTION: So you have answered my question only on the sentence and not on the basic conviction?

MR. BRUDER: Right. We have not argued and we have not taken any position that the jury selection in this case affected the guilt-innocence determination.

QUESTION: What would happen in the Texas court if we cavated the death sentence?

MR. BRUDER: The Texas court would have no alternative but to either send it back for a new trial or if the Governor elects to commute his sentence to life then he has no recourse, which has been done in the past.

QUESTION: Do you mean a new trial on guilt or innocence?

MR. BRUDER: Yes. Under Texas law, any time punishment is assessed by a jury and there is a defect in the punishment process, the entire case is reversed and it is sent back from square one.

QUESTION: So if we just vacate the death sentence, there is a new trial?

MR. BRUDER: A high probability.

QUESTION: And yet that is just a quirk of Texas law?

MR. BRUDER: Yes, Your Honor.

QUESTION: Well, actually we would only send it back for further proceedings, not inconsistent --

MR. BRUDER: Not inconsistent.

QUESTION: -- with our decision, and then it

would be up to the Texas courts to say whether it is a new trial on guilt or innocence.

MR. BRUDER: That's true.

QUESTION: But you are telling us that the prospect is that there would be.

MR. BRUDER: There is a very good prospect that there would be. The only thing I can say is that historically following the 1972 death penalty decision, the Governor commuted almost all of the people on death row.

QUESTION: And that avoids a new trial on guilt or innocence.

MR. BRUDER: Right. That is, the legality of that has been challenged and has been upheld.

QUESTION: What you are saying then is that for the federal law purposes, a decision here in your favor does not affect the validity of the basic conviction.

MR. BRUDER: That is correct.

QUESTION: And it is only because of the Texas law quirk that it does.

MR. BRUDER: That is correct.

I would like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Becker.

ORAL ARGUMENT OF DOUGLAS M. BECKER, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The Court is well aware of what is not at issue in this case; the constitutionality of the death penalty in general and the constitutionality specifically of the general Texas statutes for adjudication of guilt and imposition of the death penalty have previously been upheld. Therefore, the only issue before us today is fairness in the jury selection procedures.

QUESTION: General Becker, do you agree with your opponent that the validity of the conviction is not in issue, it is just the death penalty --

MR. BECKER: Yes, as a constitutional matter, that is correct, Your Honor. Now, he has correctly characterized what Mr. Justice Blackmun has called a quirk of Texas law, that we would not be able simply to resentence him as far as I know under our procedures. He would be entitled to an entirely new trial on guilt or innocence under Texas law unless the Governor were to act in the manner that he describes. He is accurate upon that point.

Now, I want to make perfectly clear what the holding that the state of Texas is asking the Court to

make today. It is in essence exactly what the Court of Criminal Appeals has come out with in the matter and that is that we have side by side Witherspoon and section 1231(b) of our penal code, and that jurors who are excluded upon either basis consistently and accurately that that would comply with the Constitution.

QUESTION: The problem with your statement is that Witherspoon said that jurors could not be excluded for cause unless they unmistakably make clear that their disbelief in capital punishment would prevent them in all cases from imposing it, not could be excluded on either basis, that they could not be excluded constitutionally. That is what Witherspoon held.

MR. BECKER: Your Honor, section 1231(b) is not aimed at all at excluding jurors solely because they are against the death penalty. It is neutral upon that basis. It is aimed as much at excluding jurors who are in favor of the death penalty. It is entirely neutral with respect to that particular attitude about the death penalty. What it is not neutral about is jurors who can be biased in either direction.

Now, before counsel for petitioner made a statement that if a juror says that he is not unalterably opposed to the death penalty, that he should be qualified to sit, period, under Witherspoon. Although

that may be true and was highly applicable to the pre-Furman type statutes that gave juries basically unbridled discretion in the imposition of the death penalty, it shouldn't be true any more. Such a juror might well be an extremely poor juror for the defendant or for the state under Texas law because he no longer has unbridled discretion.

The fact questions that they had in Lockett are now in Texas at the punishment stage of trial, and really I don't think it makes any difference at all what the jurors' feelings are about the death penalty, either pro or con, under the Texas statutes and Texas law. And certainly the prosecutor and the judge in this case seem to be of the opinion that it made very little difference.

In other words, the common pattern in the voir dire was to ask the juror what his attitudes were about the death penalty, and if the juror said, well, I am unalterably opposed to the death penalty and I could never vote to impose it, typically in almost every instance there was no objection upon Witherspoon grounds or that the juror was disqualified for service.

In one case where there was an objection that he was disqualified, the court said, well, tell him about our statutory scheme. The prosecutor would then go on to explain, well, even though you could never vote for the

death penalty, and I respect that belief, let me explain the Texas scheme. There are two distinctive features of it. In the first place, we have fact questions at the guilt or innocence stage of trial, and you will never actually have to write life or death on a piece of paper. You will never have to raise your hand and vote that the defendant lives or the defendant dies. Instead, you deliberate the questions of fact.

Now, even though your feelings are very strong against the death penalty, could you fairly deliberate the questions of fact knowing that you never have to vote for death or for life actually directly. Some jurors said, well, yes, I could do that, and what the state submits is that those jurors are qualified to sit on a Texas jury. Under Witherspoon, the doctrine of Witherspoon, they might have been excluded from jury service, and yet 1231(b) saves them for jury service and we don't think that we need submit statistical studies to show that many of those jurors will be favorably disposed toward the defendant.

QUESTION: I suppose you would suggest that Witherspoon is beside the point in a sentencing scheme such as you have and although you purport to be following Witherspoon as a parallel track, you really shouldn't have to?

MR. BECKER: That is precisely so, Mr. Justice White. It is a round peg in a square hole and it will lead -- what it will do is, if we followed Witherspoon and not section 1231(b), what we are going to have on Texas juries and indeed those jurors, many of the jurors that he complains about are people who would have been perfectly qualified under a pre-Furman unbridled discretion type of statute. There are people who -- he notes that several of the jurors excluded were in favor of the death penalty all the way -- Mahon, Jenson, Coyle, and probably McDonald who was rehabilitated insofar as she was ultimately in favor of the death penalty.

QUESTION: Mr. Becker, let me interrupt you. I had understood from your brief -- perhaps I didn't read it correctly -- that you were conceding that Witherspoon does apply in Texas in light of the new statute.

MR. BECKER: Your Honor --

QUESTION: Your brief says that categorically.

MR. BECKER: Yes.

QUESTION: Now it seems to me you are arguing something quite different.

MR. BECKER: Well, I don't mean to be arguing something quite different. Perhaps the confusion comes in with the phrase "does Witherspoon apply to Texas."

What I have said is at the outset I think in those death penalty trials in Texas where Witherspoon was used is the basis for qualifying that test, that those convictions and death penalties are all right under the Constitution. But I am also --

QUESTION: On page 33 of your brief you state that the Texas Criminal Court of Appeals has held that Witherspoon is applicable to capital cases in Texas.

MR. BECKER: Yes.

QUESTION: Are they decisions decided since the statute became effect on January 1, 1974 --

MR. BECKER: They are, Your Honor.

QUESTION: -- was enacted?

MR. BECKER: They are under the new statute.

QUESTION: They are under the new statute?

MR. BECKER: Yes.

QUESTION: Then how can you argue that under Texas law Witherspoon does not apply?

MR. BECKER: What the Court of Appeals has held is that either a trial conducted in compliance with Witherspoon or in compliance with 1231(b) comports with the Constitution. What we are saying is we agree with that statement, but that 1231(b) is a more fair, a more equitable and a superior way to conduct voir dire jury examination in Texas than in Witherspoon.

QUESTION: But it is our province, is it not, as opposed to the Texas Court of Criminal Appeals, to have the final say as to whether a decision of this Court does or does not apply to a particular factual situation in a state court.

MR. BECKER: Quite so, and the idea is growing, Your Honor. In our brief, we stated that the only expression in Texas law that we knew of from the Texas Court of Criminal Appeals for the theoretical construct is made is Judge Odom dissenting in the Hovila case. Actually I probably overlooked the dissenting opinion of another judge in that case, and twelve days ago yet a third judge dissenting in the death penalty case stated that because I am persuaded that the Witherspoon holding per se is no longer a viable measure of qualifying jurors in the bifurcated proceedings in a capital case. He dissents from the majority opinion.

QUESTION: But don't you have to be arguing that in no one case can you comply with both?

MR. BECKER: It would be difficult.

QUESTION: And you don't think the Court of Criminal Appeals said that you had to comply with both?

MR. BECKER: No. No.

QUESTION: It is either one?

MR. BECKER: Yes, if a juror is excluded under

either one. Now, personally I am standing before the Court to say that I think 1231(b) is the fairer way to go about it. It may be -- and the difficult point about our argument --

QUESTION: But you do concede I gather then that 1231(b) would exclude some people that Witherspoon would not?

MR. BECKER: Yes, Your Honor.

QUESTION: Or that it would qualify some people that Witherspoon would not. Which way would it do, both?

MR. BECKER: Yes, Your Honor, both.

QUESTION: And Witherspoon would say, as it did say, it could not be eliminated from the jury for cause.

MR. BECKER: Yes, Your Honor.

QUESTION: That is what Witherspoon said, it was a negative decision.

MR. BECKER: Yes.

QUESTION: It said the state is prohibited from excusing from a jury for cause of a venireman unless they make clear the following.

MR. BECKER: Well, the focal point of the inquiry is quite different.

QUESTION: Witherspoon didn't say what people could be, but it said what people could not be.

MR. BECKER: Yes, Your Honor, but I think the

focal point of what 1231(b) announces is quite different from Witherspoon and necessarily so because of our statute. A juror who was qualified under Witherspoon but who was a convicted felon under Texas law is disqualified from service.

QUESTION: Well, I suppose he is if he is the defendant's brother, too.

MR. BECKER: Yes, and for all sorts of other reasons. We say --

QUESTION: Witherspoon doesn't have anything to do with that.

MR. BECKER: Yes, sir, I know. But I am saying that 1231(b) itself is a point of inquiry that is sufficiently different from Witherspoon, that it should stand as an independent basis for exclusion of jurors if it is properly applied.

Now, one point that we certainly admit is that 1231(b) is a statute that is susceptible of great abuse. There is no question about that. If the juror said, well, I don't like the death penalty but if it were really an extreme case I could vote for it, I suppose, and the prosecutor says I can't exclude this juror because of unalterable opposition, I will just come right in and hit her with the next question, a statutory question, and she says, well, I suppose I would be affected, then

a much more difficult case is presented. It is possible that the prosecutor, by not explaining the meaning of the terms, has succeded in subverting Witherspoon by using it in this manner.

QUESTION: Has anybody, any court in Texas -- certainly the legislature has not -- has any court in Texas explained the meaning of the word "affect"?

MR. BECKER: The Court of Criminal Appeals has not spoken upon the meaning of the word "affect" Now, I think that this petitioner's death penalty conviction will stand or fall not upon what any Texas statute says nor upon what the Court of Criminal Appeals says, but upon what was done at his trial. That will govern the outcome. And what was done at his trial is the way the court and the prosecutor explained the 1231(b) question.

QUESTION: What is your understanding of the meaning of the word "affect" in 1231(b)?

MR. BECKER: Essentially that a juror would be unbiased on the fact questions and deliberations that are at the punishment phase of the trial.

QUESTION: You mean "affect" means impair or distort?

MR. BECKER: To be biased in deliberations, to be unfair --

QUESTION: Well, it is a verb so it means

impair or distort or bias or excuse.

MR. BECKER: Yes, Your Honor. It means that -- in its most extreme form, it means that the juror would lie. This question was posed over and over again and many jurors admitted that they would. The question was posed -- especially, I would look at the jurors who were in favor of the death penalty who were excluded upon the basis of 1231(b), Mahon, Jensen and Coyle, to where they were jurors who said, well, we like the death penalty and then, when the prosecutor explained the sentencing scheme, explained the questions, explained the aggravated and mitigating factors, explained that their deliberating would be closely guided, the reaction that they got from those jurors was do you mean I wouldn't have in effect free choice, you mean it wouldn't be completely up to me. And the prosecutor would say that's right. In effect, he might have said that is the way it used to be under Furman, but the Supreme Court said that that tends to be arbitrary and capricious and that it is an unfair way to qualify a jury or an unfair way to inflict the death penalty upon someone. We don't do it that way any more. Your discretion must be guided.

And then Jurors Mahon and Jensen in the portions of voir dire cited in our brief say, well, surely if I were of the opinion, for whatever reason, that the

defendant should live or die, there would be one of those questions that would go the way I wanted it to go, and the prosecutor would say no, not necessarily. The questions may lead you to a result that is actually against the way that in the abstract you feel, apart from how you feel that whatever penalty the defendant should receive, and then they would reply, well, in that case I don't believe I can take the oath.

They said in effect I refuse or I cannot swear that my deliberations will be guided in the way the law says they must be guidei. There were jurors who would have been perfectly qualified under the pre-Furman statutes but they are disqualified under 1231(b) and we submit that the defendant's jury is more fair for that result.

QUESTION: Mr. Becker, I notice you always said prosecutor. Didn't the defense counsel get into this, too?

MR. BECKER: Yes, Your Honor.

QUESTION: Does he do anything in Texas?

MR. BECKER: Yes, Your Honor.

QUESTION: Well, the question I really want to ask is if we have a juror that is uner Witherspoon, can he be disqualified under the Texas statute?

MR. BECKER: If he is qualified under Witherspoon?

QUESTION: Yes.

MR. BECKER: Yes, Your Honor, he can be qualified under Witherspoon and disqualified under the Texas statute. The converse is also true. He can be disqualified under Witherspoon and qualified under the Texas statute. In this case, precisely that thing happened to one juror. He appears in the charts at the conclusion of our brief and it is a mistake in our charts. I hope it is the only one that I made. He is listed as a juror excluded on the basis of Witherspoon or 1231(b), Mr. Smotherman. Actually that is not true. He was rehabilitated in the manner that I described and was excused for a different reason. But the testimony, the way the voir dire for that juror was conducted to me is a microcosm of all the arguments that we have and I would like to take just one minute to go over it with the Court.

He stated -- he was disqualified under Witherspoon quite clearly at 49-54 of the voir dire. He stated he could never vote to impose the death penalty because of his feelings against it. He personally could not participate or, as the question was asked, to your way of thinking, you could never ever, as you presently feel, could never ever vote for the death penalty. Answer: That's right, I don't believe. The prosecutor went on to ask him the statutory questions, which is the

way that all jurors are handled in this voir dire and he also agreed that he could not -- he had to say that "I believe I couldn't answer them all yes if it would send him to his death." That is page 49-59.

At that point, Mrs. James, the defense counsel took over and she rehabilitated him upon the basis of section 1231(b). She explained to him Texas law in more detail, explained to him and asked him to go over his feelings and the next twenty pages are a fascinating study for us. They show the agony that the juror himself was going through in deciding this question. Many of these jurors had never thought about the death penalty before they were placed in the voir dire context, perhaps this man had not. But as he went through it and as she took him, at page 49-69 and 49-70, it is like a light dawning in his mind when she asks him -- she explains the procedure and says, "I do not, no matter what, I don't believe in the death penalty at all, that is what I want you to understand." Question by Mrs. James: "You would completely ignore the facts and automatically answer the questions no, regardless of the facts in any case?" He answers, "I would not do that." She says, "Thank you. Then would there be a feeling in your mind that you would keep an open mind and you could take affirmative action in answering those questions if

you ever get them which might result or would result in the imposition of the da th penalty in the case? In other words, could you answer the questions as questions honestly?" "Yes, I think I believe I could." And he was rehabilitated and the judge stated that he was qualified to be on the Texas jury, in spite of the fact that he could have been excluded under Witherspoon earlier, and defense counsel rehabilitated him using that statute.

So I think that the statute is available for the benefit of the defendant also.

QUESTION: Mr. Becker, did that juror serve?

MR. BECKER: No, Your Honor, eventually he was excluded for another reason.

QUESTION: General Becker, could I ask you a question about the statutory language. 1231(b) says jurors have to be informed about the death penalty, and then it says a prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations in any issue of fact.

Suppose the juror is asked the question in the language of the statute and the juror responds by saying, well, since it is a death penalty I know I would scrutinize every witness as closely as I could and I would think about it a long time before I came to a conclusion, so

the answer is yes, it would affect my deliberations. Must that juror be disqualified?

MR. BECKER: I have problems with the disqualification of a juror. Now, it all depends --

QUESTION: Doesn't the statute plainly require his disqualification in that case?

MR. BECKER: Yes, Your Honor, depending upon the interpretation that is given the word "affect," and the answer --

QUESTION: He just answers the question no and then he explains his answer and the statute requires -- I may have the negative and the afrirmative turned around, but in any event if he gives the wrong answer it seems to me the statute says you must be disqualified.

MR. BECKER: With no further explanation of the word "affect," I have great problems with that voir dire. I have no problems with the voir dire that was conducted in this --

QUESTION: Don't you then have a problem with the statute as it is written? You want to redefine the word "affect" and say, well, it really means something else.

MR. BECKER: No, Your Honor, I don't want to redefine it. I want to view it in the manner it was defined at this petitioner's trial. And as I say, it makes

no difference what the Court of Criminal Appeals said in some opinion, or ultimately it makes no difference what you and I might agree to.

QUESTION: The only thing that is critical under the statute is unless the prospective juror states under oath, and to say that the juror just can't do that for the reason that the juror interprets the word "affect" in the way that most people wuld interpret the word "effect" --

MR. BECKER: Well, the way that such a voir dire could -- the conviction might be upheld as to view the word "affect" that everyone understood that it meant that you could not be unbiased in your deliberations. If it is interpreted in that manner, as perhaps most people would, then the conviction would be ssafe. But if you interpret the word "affect" to mean simply to scrutinize the evidence more closely, then there is a problem that is involved. I think it is up to the trial courts and the prosecutors to explain to the jury the meaning of the word "affect."

QUESTION: But they never do. Do they ever do that?

MR. BECKER: They did it in this case, Your Honor. They did it at length with every --

QUESTION: They explained the word "affect"?

MR. BECKER: Absolutely. They explained it in terms of -- well, I don't think I would say, Your Honor -- at no point did the prosecutor or the judge say, well, now I will define the word "affect" as used in the statute.

QUESTION: That is exactly right.

MR. BECKER: They did not, but they explained the process and it is the process that is important, not the definition of the word, and they said the process is you will get the fact questions, you must answer them honestly based upon the evidence, not on some whim you have, not on some subjective conclusion that you've made during the trial, but on the way the law states you must decide the question, that that is what you must do, and if you cannot do that that means that you will be affected. That is the way it was explained.

QUESTION: I can see how that worked out with some of these jurors, but give me the language on Juror White, where she conceded something about what she could or couldn't do that would --

MR. BECKER: All right, Your Honor. At page 20 of my brief, whichI suppose is page -- well, I have it marked as 15-39 to 42 of the voir dire. I'm sorry, I don't know what page of the appendix it is.

QUESTION: What page of your brief?

MR. BECKER: Page 20.

QUESTION: Okay.

MR. BECKER: Actually it starts on 19 and 20. Page 19 is the explanation of the law and the statute as I just explained them to Mr. Justice Stevens. Then on page 20, the very clear explanation by the court: "You cannot go back in the jury room and say, well, I want him to get life imprisonment so I am going to answer the questions no. You have got to answer the questions the way the evidence tells you it ought to be answered without any regard to what punishment would result."

And in that context she answered that she would be affected. Now --

QUESTION: Your standing, I take it, on how the statute was applied in each case in relation to the questions put and the answers given.

MR. BECKER: Yes, Your Honor, that is --

QUESTION: You really can't escape the proposition that was put to you that affect might mean something quite different from what it does in the specific cases set out here.

MR. BECKER: That is true, Your Honor.

QUESTION: But we've just got this case.

MR. BECKER: That's correct.

QUESTION: But you think this necessarily means that what she is saying, "I will be affected," and that

means to you, because of the form of the question, the context, that she was saying that she could not say that she would come to her conclusions based on the evidence?

MR. BECKER: Yes, Your Honor. When you read the voir dire as a whole, you see we are not talking about some random question just kind of thrown in at some point that hopefully the juror understood what they were driving at. We are talking about the entire focus of the voir dire. We are talking about literally pages of explanation of the statute and everything that I have been talking about with each veniremen, each prospective juror, and it was unmistakable in my opinion to those jurors that, regardless of how Mr. Justice Stevens or any Justice would define the word "affect" or as the Fifth Circuit did in the Burns case, that in this case it was defined in the manner that I have described to those jurors. They couldn't have missed it.

QUESTION: Just as a point of information, the language quoted on pages 19 and 20 of your brief, that is from -- is that in the appendix?

MR. BECKER: No, Your Honor, it is not. Whenever anything in my brief is also in the appendix, I followed it with an appendix cite, so it is not.

QUESTION: So we have to look at the original record to get the whole flavor of this.

MR. BECKER: Most certainly, and there are many parts of my brief where the portions we have cited are not in the appendix and, yes, it will be necessary.

QUESTION: The original record is here?

MR. BECKER: Yes, Your Honor, it is. As a matter of fact, there are a number of other original records here in cases where petitions for a writ of certiorari have been filed raising this very question, this 1231(b) question. There were five of them filed in January and those records are here in which the Witherspoon and 1231(b) question was raised.

QUESTION: Why are the records here?

MR. BECKER: The Court requested them.

QUESTION: We called for the records?

MR. BECKER: Yes, sir.

QUESTION: In all those cases?

MR. BECKER: Yes, sir.

QUESTION: And then denied cert or are they held?

MR. BECKER: They are pending. In three of those five cases where cert is pending, where the records were requested in January, the defendants, the petitioners are raising the questions not as petitioner here is but that -- now, as I read their petitions -- but that jurors were excluded from their trials because of unalterable

opposition to the death penalty, and the 1231(b) inquiry was not met and the petitioner is complaining because 1231(b) was not invoked, and in my opinion they have a stronger case than petitioner here today. But it rests for another day, and the case that we have we feel got him the best jury that was possible.

Now, the only basis -- I have explained that in my opinion 1231(b) is going to create the fairer jury for the defendant than Witherspoon would. Why then would not petitioners in those three cases I described now pending before the Court be entitled to relief? And the only answer I can give to that is that even though the jury examinations in their cases were not as good as petitioners Adams had, the Constitution even in death penalty cases does not require perfection and that Witherspoon exclusion, which has been upheld by this Court is a sufficiently fair method of qualification of jurors that those convictions too would survive.

One other question that I would attempt to give some guidance to the Court upon is what affect upon the statutes of the other states a holding in our favor in the manner we've advocated today would have. There are 38 states by my count that now have a death penalty statute. Five of those have judge sentencing. So 33 still have death penalty sentencing by jurors.

The common pattern, as the Court well knows, is a set of aggravating and mitigating factors. As far as I know, no state has affirmatively experienced the Texas method of not having jurors actually vote on life or death but merely answering the questions with known automatic results.

QUESTION: You say so far as you know, no other state does it?

MR. BECKER: That's correct. Now, the statute of Washington state appears to allow for that but there are no cases upon it yet. It is a new statute. And there are other statutes that are ambiguous, but I have not read -- I do not read their case law as saying that it -- it is certainly not as clear as in Texas as far as I can tell. But the statutes of all 33 of those states would be quite amenable to the kind of 1231(b) qualification and rejection of a Witherspoon type qualification if they so desired. It might have that effect.

As I say, if we have made the jump from Furman to Jurek, from the unbridles discretion statute to the guided discretion statute, it seems to me that the interest of justice and the interest of the defendant will best be served by having jurors who can swear that they are going to be fair on the questions of fact, that they will be fair in deliberating on the questions of fact,

regardless of their feelings on the death penalty, and that that will lead to a jury more expressive of the community conscience than the jury the petitioner contends he ought to have had at his trial.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Bruder?

ORAL ARGUMENT OF MELVYN CARSON BRUDER, ESQ.,
ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. BRUDER: Just briefly. It seems a shame to me somehow that if both Witherspoon and 1231(b) parallel each other, and the state contends 1231(b) is fairer and the defendant contends that Witherspoon is fairer, that we can't provide for an election prior to trial and let the chips fall where they may based on that election.

I think it is fair to say that this petitioner does not agree with the state that 1231(b) is in any sense of the word fair.

There are two cases that I want to particularly point out to the Court. Counsel talks about we have this word "affect" but we don't want to define it, we simply want to throw it out there for the jury to consider, tell them the entire process, and then on that basis let them decide what they think it means, and that 1231(b) is fair because of that.

Yet, in Hovila I, 532 S.W. 2d 294, former Presiding Judge Morrison said that the court will presume that a juror's answers will be affected. The punishment answers will always be affected by the existence of a mandatory penalty of life or death.

QUESTION: Would your problem be cured, Mr. Bruder, if the judge on his own had instructed the jury that when I describe the statute to you, using the word "affect," what is meant by that is that the possibility of the death penalty will not lead me to vote not guilty in a case which I might otherwise vote guilty, would that take care of it?

MR. BRUDER: Are you talking --

QUESTION: You are defining "affect" at least as the judge --

MR. BRUDER: You are talking guilt-innocence? You are talking about the guilt-innocence phase as opposed to punishment.

QUESTION: Yes.

MR. BRUDER: I think that would -- that may satisfy the second part of the Witherspoon standard on guilt-innocence, and I think a question could be formulated to follow up on 1231(b) that would satisfy the Witherspoon standard.

QUESTION: Now, if the Court decided that the

questions and the answers taken together showed that each of the jurors questioned understood that meaning of the word "affect" --

MR. BRUDER: But we are talking about such a subjective problem that I can't see how the court can do that. I think it would be difficult.

QUESTION: I don't know if it could either, but suppose the court did -- is the court free to make this evaluation on the basis of how the juror answered the question?

MR. BRUDER: The court is free to do it, certainly. I think the court would have difficulty squaring that type of a rule with Witherspoon as well as inviting a very tremendous caseload and an increase in its docket because every death penalty case from Texas would then become a case that is automatically reviewable by this Court on the basis of 1231(b) versus Witherspoon violations.

QUESTION: What you are saying is that we should go with you and force the state of Texas to amend its statute?

MR. BRUDER: Amend its statute or, Your Honor, construe the statute which I suspect is coming right around the corner. And the other case that I wanted to bring to your attention is Russell v. State, to which

counsel alluded. The number is 63-715. It was delivered on March 12, 1980. And in the dissenting opinion to which counsel alluded, he left off a phrase that I want to direct to the Court's attention. Judge Clinton said, "Witherspoon is no longer a viable measure of qualifying jurors in the bifurcated proceedings of the capital case in that they do not directly assess punishment and that a good deal more manifestation than merely acknowledging the magic phrase of 1231(b) should be required for disqualification. The record must be made clear that the juror understands the word 'affect' to be a synonym for bias for predisposition to vote in a certain way, and then 1231(b) satisfies the Witherspoon standard and, regardless of whether you call it 1231(b) or the Texas-Witherspoon procedure, it is constitutional."

QUESTION: When was 1231(b) enacted?

MR. BRUDER: I believe it was enacted as a different penal code article shortly after the Furman decision and readopted in the 1974 penal code. I think it was Article 673.

QUESTION: So it was reconsidered and readopted, most recently enacted after the establishment in Texas of the legislative system that was approved in the Jurek case.

MR. BRUDER: Well, it was enacted along with --

QUESTION: It is part and parcel of the Jurek legislation?

MR. BRUDER: Right.

QUESTION: It is not an historical survival from an earlier day.

MR. BRUDER: It is not. It is part and parcel of the Jurek system.

Thank you.

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

(Whereupon, at 2:07 o'clock p.m., the case in the above-entitled matter was submitted.)

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