Louisiana Law Review

Volume 49
Number 4 *March 1989*

Article 3

3-1-1989

Ineffective Assistance of Counsel in Voir Dire and the Admissibility of Testimony of Witherspoon Excluded Veniremen in Post-Conviction Evidentiary Hearings

Steven C. Bennett

INEFFECTIVE ASSISTANCE OF COUNSEL IN VOIR DIRE AND THE ADMISSIBILITY OF TESTIMONY OF *WITHERSPOON* EXCLUDED VENIREMEN IN POST-CONVICTION EVIDENTIARY HEARINGS

*Steven C. Bennett**

I. INTRODUCTION

In *Witherspoon v. Illinois*,[1] the Supreme Court of the United States recognized the principle that one who opposes the death penalty, no less than one who favors it, can make the discretionary choice of punishment entrusted to him by the state in a capital case and can thus obey the oath he takes as a juror.[2] A jury from which all such people have been excluded, the Court indicated, cannot perform the task demanded of it—expressing the conscience of the community on the ultimate question of life or death.[3] The Court held that a sentence of death cannot be carried out if the state succeeds in excluding prospective jurors for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.[4]

Since *Witherspoon*, the courts and the legal profession as a whole have struggled to implement the Supreme Court's command that veniremen may not be excluded from capital juries solely because they have general reservations about the death penalty.[5] Although the courts have already devised solutions to many of the questions attendant to the *Witherspoon* rule, some of the most difficult questions remain unre-

---

* B.A., 1979, Macalester College; J.D., 1984, New York University School of Law. The author is an attorney practicing in New York City. The views expressed are solely those of the author.

1. 391 U.S. 510, 88 S. Ct. 1770 (1968).

2. Id. at 519, 88 S. Ct. at 1775.

3. Id.

4. Id. at 522, 88 S. Ct. at 1777. Such a jury, the Court said, violates the sixth amendment right to an impartial jury. See id. at 518, 88 S. Ct. at 1775.

5. See Schnapper, Taking *Witherspoon* Seriously: The Search for Death-Qualified Jurors, 62 Tex. L. Rev. 977, 994 (1984); see generally Note, At Witt's End: The Continuing Quandary of Jury Selection in Capital Cases, 39 Stan. L. Rev. 427 (1987); Note, The Standard for Juror Exclusion in a Capital Case: Wainwright v. Witt, 55 U. Cin. L. Rev. 293 (1985).

solved. One particular troubling question is: to what relief is a defendant entitled where the defendant's trial counsel, unaware of or inattentive to the dictates of *Witherspoon*, fails to monitor the voir dire proceedings closely and to take appropriate steps to counter prosecution challenges for cause that potentially violate the *Witherspoon* directive?

Consider the following example. A defendant is on trial for murder; the penalty for the crime, if the jury so decides, may be death. Because the defendant is indigent, the court assigns him a lawyer. Unfortunately, the lawyer is one of the least competent in town. What is worse, he has little experience in criminal law and has never tried a capital case. The trial begins with jury selection. The prosecutor asks each venireman a standard set of questions, largely aimed at determining the venireman's background and his knowledge of the case.[6]

Eventually, however, the questioning turns to the venireman's attitude toward capital punishment. The colloquy with a particular venireman proceeds as follows:

> PROSECUTOR: Have you ever thought about capital punishment?
> VENIREMAN: Yes. I guess so.
> PROSECUTOR: What are your thoughts about capital punishment?
> VENIREMAN: I don't know. I'm not sure whether I could do it.
> PROSECUTOR: Do what?
> VENIREMAN: You know, give the death penalty. I don't know whether I could do it.

The prosecutor challenges the venireman for cause. The defendant's counsel does not object and does not ask for permission to attempt to "rehabilitate" the venireman by showing that he could impose the death penalty in some cases and that he could follow the instructions of the court concerning capital sentencing. The judge grants the motion to dismiss the venireman for cause. The defendant is tried, convicted, and sentenced to death. He loses his appeal to the state supreme court. His motions for post-conviction relief in the state's courts are summarily denied.

---

6. This type of voir dire procedure, of course, does not occur in every case. Rule 24(a) of the Federal Rules of Criminal Procedure provides that the court has discretion either to conduct the voir dire itself or to permit counsel to do so. Ten states follow the federal rule and about the same number permit examination by the judge only. Twenty-two states provide for examination by both the judge and the attorneys, and in the remaining states counsel conduct the entire examination. See Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 1344 (5th ed. 1980); G. Bermant & J. Shepard, The Voir Dire Examination, Juror Challenges, and Adversary Advocacy 22 (1978).

Years later, the defendant pursues his post-conviction habeas corpus remedy with the aid of new counsel in a federal court. The defendant's new attorney interviews all of the participants in the original trial: the defendant's original trial counsel, the witnesses, the prosecutor, the judge, the jurors *and* the *Witherspoon* excluded venireman. The new counsel determines that the original attorney was largely unaware of the *Witherspoon* rule and never even considered objecting to the exclusion of the venireman. The excluded venireman, meanwhile, informs the new attorney that the prosecutor's questions confused him. He did not mean to say that he would not impose the death penalty in any case. He readily accepts examples of horrible crimes for which he might be willing to impose the death penalty. He also states that he was not aware that the judge would instruct him about how to apply the death penalty statute. When the new attorney explains the capital sentencing law to him, he further indicates that if he had been properly instructed and the facts had called for it, he would have been able to impose the death penalty.

The defendant's new counsel asks for and is granted a hearing on the federal habeas corpus petition.[7] At the hearing, the defendant's new counsel argues that the defendant's old counsel provided ineffective assistance during the voir dire phase of the defendant's trial. The new counsel seeks to call the old counsel as a witness. The State lawyers object, but are overruled. The defendant's new counsel elicits the admission from the old counsel that his failure to attempt to rehabilitate the venireman or to object to the venireman's exclusion was not the product of a strategic decision. The defendant's old counsel indicates that he simply did not know that he could have made such an objection. The defendant's new counsel calls as his next witness the *Witherspoon* excluded venireman. Lawyers for the State again object. The federal judge conducting the hearing on the habeas petition is about to rule.[8] Should the testimony be admitted?

---

7. I assume, in this scenario, that there are no questions of waiver or procedural bar of the *Witherspoon* issue. Such questions, of course, are frequently the focus of post-conviction proceedings. See generally Johnson & Davenport, A Federal Habeas Corpus Primer, 4 Am. J. Trial Advoc. 51 (1980).

8. This scenario is far from fanciful. Thirty-four states hold prisoners on death row; at least 1,984 men and women are currently under sentence of death. N.Y. Times, Aug. 1, 1988, at D9, col. 1. A total of thirty-seven states have capital punishment statutes. Id. Although many jurisdictions have made advances in improving the training and education of those attorneys who handle capital cases, see, e.g., Ill. Rev. Stat. ch. 110A, Rule 607 (1987); N.C. Gen. Stat. § 7A-450(b)(1986); Ohio Rev. Code Ann., Crim. Proc. Supp. Rule 65 (Baldwin 1988) (these statutes require that an indigent capital defendant be represented by at least two court appointed attorneys), the trial of the capital case is unique and calls for special skills that defense counsel often does not possess. See generally

The purpose of this article is two-fold. First, the article seeks to establish that where a defendant's trial counsel, for reasons unrelated to trial strategy, fails to question a venireman properly regarding his attitude toward the death penalty and this failure prejudices the defense, the defendant is denied the effective assistance of counsel. Second, the article attempts to demonstrate that the defendant, in order to make out such a claim of ineffective assistance in an appropriate federal habeas corpus proceeding, ought to be permitted to introduce the testimony of the *Witherspoon* excluded venireman regarding the answers that he would have given to appropriate rehabilitative questions. The aim of such testimony should be to establish whether the failure of defendant's counsel to object to the dismissal of the juror or to ask rehabilitative questions operated to the defendant's prejudice.

Part II of this article examines the current standards by which effective legal representation is measured. Part III, after examining the origins and outlines of the *Witherspoon* rule, establishes that the failure to attempt to rehabilitate a *Witherspoon* excluded venireman may, in certain cases, constitute ineffective assistance. This part also demonstrates the critical importance of determining what the excluded venireman would have said had defense counsel rehabilitated him properly. Part IV notes and answers potential objections to the admission of the testimony of a former venireman.

II. The Standard For Effective Representation

The sixth amendment guarantees a criminal defendant the right "to have the assistance of counsel for his defence."[9] The right to counsel, the United States Supreme Court has long held, includes "the right to effective assistance of counsel."[10] The right to effective representation applies to every stage of the criminal proceedings that follows the lawyer's appointment.[11] The question whether a defendant has received

---

Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299 (1983). Legal representation during the various phases of the capital trial, including the voir dire examination, is therefore sometime less than effective. As many as one-fifth to one-half of all death penalty appeals involve claims of ineffective assistance of counsel. See Lawyer's Ability in Death Penalty Cases Questioned, UPI Wire Store, Sept. 28, 1986, available on LEXIS, NEXIS Library, WIRES file. Such claims of incompetence clearly can extend to the lawyer's performance during the voir dire selection of jurors. See Jurek v. Estelle, 593 F.2d 672, 683 (5th Cir. 1979) (noting that attorney was apparently unaware of the workings of the *Witherspoon* rule), vacated on other grounds, 623 F.2d 929 (5th Cir. 1980), cert. denied, 450 U.S. 1001, 101 S. Ct. 1709 (1981).

9. U.S. Const. amend. VI.

10. McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 n.14 (1970).

11. Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708 (1980).

adequate representation is not answered simply by considering the paper qualifications of the lawyer. In *Strickland v. Washington,*[12] the Supreme Court's landmark decision on the subject of effective assistance of counsel, the Court indicated that the test of representation is whether it was "reasonably effective" under the circumstances.[13]

In *Strickland*, the defendant, Washington, acting against his attorney's advice, pleaded guilty to three murders and waived his right under Florida law to an advisory jury at sentencing. To prepare for the hearing at which the judge would determine whether to impose the death penalty on his client, Washington's lawyer interviewed him and spoke on the telephone with his wife and mother. He neither met the defendant's family nor sought out other character witnesses nor requested a mental examination of the defendant. At the sentencing hearing, the attorney put on no evidence, even though several witnesses could have testified that Washington was "a responsible, nonviolent man, devoted to his family, and active in the affairs of his church."[14] Instead, the attorney's representation consisted entirely of making an argument on the defendant's behalf. The court sentenced Washington to death. After exhausting his state court remedies, Washington petitioned the federal district court for a writ of habeas corpus.

When the case reached the United States Supreme Court on certiorari, the court seized the opportunity to set out a general standard by which to judge all claims of ineffective assistance of counsel and to measure whether counsel's performance so prejudiced the defense as to justify the granting of post-conviction relief.[15] The general standard adopted by the Court requires the application of a two-pronged test. The first prong of the test concerns the adequacy of counsel's performance. To gain relief, the defendant must show that his attorney's representation fell below an "objective standard of reasonableness."[16] According to the Court, the defendant can successfully attack his attorney's advice or conduct only if it was not "within the range of competence demanded of attorneys in criminal cases."[17] The Court expressly declined to set forth specific guidelines. In particular, the Court

---

12. 466 U.S. 668, 104 S. Ct. 2052 (1984).

13. See id. at 687, 104 S. Ct. at 2064.

14. Id. at 717, 104 S. Ct. at 2080 (Marshall, J., dissenting).

15. For discussions of the *Strickland* opinion, see generally Goodpaster, The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases, 14 N.Y.U. Rev. L. & Soc. Change 59 (1986); Hagel, Toward a Uniform Statutory Standard for Effective Assistance of Counsel: A Right in Search of Definition after *Strickland*, 17 Loy. U. Chi. L.J. 203 (1986).

16. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064.

17. Id. at 687, 104 S. Ct. at 2064 (quoting McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441 (1970)).

rejected the suggestion that conformance with particular norms of practice such as the ABA Standards for Criminal Justice will necessarily determine the minimum standard of effective assistance.[18] Rather, the Court proposed a case-by-case approach aimed at determining "whether counsel's assistance was reasonable considering all the circumstances."[19] In applying this approach, the *Strickland* Court further emphasized, a court must apply "a strong presumption" that the challenged conduct falls within the range of professional competence.[20]

The second prong of the *Strickland* test for ineffective assistance of counsel is whether "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different."[21] A "reasonable probability," according to the Court, is "a probability sufficient to undermine confidence in the outcome."[22] It is not enough, the Court observed, for the defendant to show "some conceivable effect" on the outcome of the proceedings;[23] virtually every act or omission of counsel could meet that test. The Court again proposed a case-by-case approach aimed at determining whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[24] Although the Court acknowledged that there are some cases in which the reviewing court should *presume* prejudice, the Court indicated that such cases are rare, such as when the trial attorney actively represented interests that conflicted with those of the defendant.[25]

Applying its two-pronged, case-by-case approach to the facts of the case, the *Strickland* Court concluded that the defendant was not entitled to habeas corpus relief. With respect to the adequacy-of-performance

---

18. Id. (noting that such standards "are guides to determining what is reasonable, but they are only guides . . . .").

In a more recent decision, the Court suggested that where an attorney's performance contravenes recognized canons of ethics and standards established by the state, such sources may be considered in determining whether the performance was inadequate. See Nix v. Whiteside, 475 U.S. 157, 168, 106 S. Ct. 988, 997 (1986).

19. 466 U.S. at 688, 104 S. Ct. at 2065.

20. Id. at 696, 104 S. Ct. at 2069.

21. Id. at 694, 104 S. Ct. at 2068.

22. Id.

23. Id. at 693, 104 S. Ct. at 2067.

24. Id. at 686, 104 S. Ct. at 2064.

25. Id. at 692, 104 S. Ct. at 2067 (citing Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719 (1980)); see also United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047 n.25 (1984) (prejudice presumed where counsel is prevented from assisting accused at critical stage of proceedings); Geders v. United States, 425 U.S. 80, 96 S. Ct. 1330 (1975) (prejudice presumed where court banned attorney-client conference during overnight recess); Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105 (1974) (prejudice presumed where court denied defense counsel opportunity to subject prosecution witness to meaningful cross-examination).

prong, the Court observed that the available record—developed after an evidentiary hearing in the federal court in which the defendant offered, among other things, affidavits from various individuals who would have testified in his favor had they been called, and in which the defendant's trial counsel was called to testify—established that counsel had made a strategic choice not to put on the witnesses in mitigation.[26] As the court noted, "[t]he aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with [the defendant] that character and psychological evidence would be of little help."[27] On those facts, the Court concluded, there was little doubt that counsel's defense, though unsuccessful, "was the result of reasonable professional judgment."[28]

Turning to the prejudice prong of the standard, the Court indicated that the evidence that the defendant claimed his counsel should have presented would barely have altered the sentencing profile that the sentencing judge received.[29] Again, the Court referred to the overwhelming aggravating evidence, concluding that there was no reasonable probability that the omitted evidence would have changed the judge's conclusion that the aggravating circumstances outweighed the mitigating circumstances.[30]

The *Strickland* Court's determination that defendant Washington had not been denied the effective assistance of counsel turned on a careful examination of the facts surrounding counsel's representation. The Court reviewed both the transcript of the original criminal proceedings and the record of the evidentiary hearing in the federal court. Indeed, the Court observed that the federal courts were not bound by the original summary determination of the state court that counsel's representation had been adequate.[31]

That the Court employed such a fact-sensitive approach in applying its new standard is instructive. It suggests that when a reviewing court considers a claim of ineffective assistance of counsel, for example, one based on the defense attorney's failure to attempt to rehabilitate a *Witherspoon* excluded venireman or to object to his exclusion, the court should proceed by reviewing the individual circumstances of the case and receiving additional evidence if such evidence is necessary to assess counsel's performance and the allegedly prejudicial effects thereof.

---

26. 466 U.S. at 699, 104 S. Ct. at 2071.

27. Id.

28. Id.

29. Id.

30. Id. at 700, 104 S. Ct. at 2071.

31. See id. at 698, 104 S. Ct. at 2070. In particular, the Court held that, in a federal habeas corpus challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court under 28 U.S.C. § 2254(d) (1977).

III. APPLICATION OF THE *STRICKLAND* TEST TO DEFENSE COUNSEL'S FAILURE TO INVOKE *WITHERSPOON* DURING VOIR DIRE

This part begins by briefly exploring the history of the *Witherspoon* rule as it has developed since 1968. With this background established, this part explores the question whether the failure of counsel to attempt to rehabilitate a *Witherspoon* excluded venireman can, under some circumstances, constitute defective or deficient performance under *Strickland*. This part concludes with an explanation of how vitally important the testimony of a *Witherspoon* excluded venireman becomes once the defendant succeeds in establishing that his counsel's performance during the voir dire phase of the trial failed to satisfy the first prong of the *Strickland* test.

A. *The Development of the* Witherspoon *Rule*

The *Witherspoon* Court reviewed an Illinois statute that, at the time, permitted the state to challenge a venireman for cause if he had "conscientious scruples against capital punishment, or [was] opposed to the same."[32] The Illinois Supreme Court had previously construed the statute to mean that any venireman who "might hesitate" to return a sentence of death could be excluded for cause.[33]

Witherspoon was tried for murder in 1960. As the Supreme Court noted, the trial court set a tone of "Let's get these conscientious objectors out of the way, without wasting any time on them" from the outset of the voir dire process.[34] In rapid succession, the prosecution successfully challenged forty-seven veniremen for cause based on their attitudes toward the death penalty. Only five of the forty-seven, however, explicitly stated that under no circumstances would they vote to impose capital punishment. Six veniremen simply said that they "did not believe" in the death penalty; the court and the attorneys made no attempt to determine whether those veniremen could nevertheless return a verdict of death under some circumstances.[35] The jury that eventually was seated found Witherspoon guilty and sentenced him to death.[36] Witherspoon's appeal to the Illinois Supreme Court was unsuccessful. The United States Supreme Court granted certiorari and reversed.[37]

---

32. Ill. Rev. Stat. ch. 38, para. 743 (1959); see *Witherspoon*, 391 U.S. 510, 512, 88 S. Ct. 1770, 1772 n.1 (1968).

33. People v. Carpenter, 13 Ill. 2d 470, 476, 150 N.E.2d 100, 103, cert. denied, 358 U.S. 887, 79 S. Ct. 128 (1958).

34. *Witherspoon*, 391 U.S. at 514, 88 S. Ct. at 1773.

35. Id.

36. See id. at 512, 88 S. Ct. at 1772.

37. People v. Witherspoon, 36 Ill. 2d 471, 224 N.E.2d 259 (1967), rev'd, 391 U.S. 510, 88 S. Ct. 1770 (1968).

The Court granted relief on the question of Witherspoon's sentence.[38] As the Court repeatedly observed, it is entirely possible that "even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State."[39] The Court suggested that unless a venireman made "unmistakably clear" that he would automatically vote against the imposition of capital punishment no matter what evidence was developed at the trial or that his attitude toward the death penalty would prevent him from making an impartial decision about the defendant's guilt, it cannot be assumed that that is his position.[40]

The function of a jury in a capital case, the Court acknowledged, is to express the conscience of the community on the ultimate question of life and death.[41] A jury from whose members have been eliminated all who harbor doubts about the wisdom of capital punishment, the Court observed, cannot speak for the community.[42] Consequently, when the state sweeps from the jury all who express some conscientious or religious scruples against the death penalty or who are opposed to it in principle, the Court held, a sentence of death imposed by such a jury cannot be carried out.[43]

In the later case of *Adams v. Texas*,[44] the Court reaffirmed the *Witherspoon* rule, but apparently modified the standard of exclusion slightly. That case involved a challenge to a Texas statute that required each potential juror to take an oath that the prospect of imposing the death penalty "[would] not affect his deliberations on any issue of fact."[45] The Court noted that the awesome responsibility of a life-or-death decision would naturally affect jury deliberations to some extent, and thus held that the state could not constitutionally exclude veniremen who had merely stated that they might be "affected" in their deliber-

38. The Court rejected as "too tentative and fragmentary" available scientific evidence that suggested that jurors who are not opposed to the death penalty tend to favor the prosecution in the determination of guilt. *Witherspoon*, 391 U.S. at 517, 88 S. Ct. at 1774. The Court therefore refused to adopt a *per se* rule requiring the reversal of any conviction returned by a jury selected in the same manner as Witherspoon's. Id. at 518, 88 S. Ct. at 1775.

39. Id. at 514, 88 S. Ct. at 1773 n.7. See also id. at 515, 88 S. Ct. at 1773 n.9; id. at 519, 88 S. Ct. at 1775.

40. Id. at 522, 88 S. Ct. at 1777 n.21.

41. Id. at 519, 88 S. Ct. at 1775.

42. Id.

43. See id. at 520-22, 88 S. Ct. at 1776.

44. 448 U.S. 38, 100 S. Ct. 2521 (1980).

45. Tex. Penal Code Ann. § 12.31(b) (Vernon 1974).

ations.[46] The Court, however, modified the *Witherspoon* formula to the extent that *Witherspoon* permitted the exclusion of only those veniremen who would "automatically" vote against the death penalty. The *Adams* Court indicated that "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or *substantially impair the performance of his duties as a juror* in accordance with his instructions and his oath."[47]

More recently, in *Wainwright v. Witt*,[48] the Court took a further opportunity to "clarify" the *Witherspoon* decision.[49] The defendant in *Witt* sought federal habeas corpus relief from his conviction for murder and sentence of death. A federal district court denied the petition, but the United States Court of Appeals for the Eleventh Circuit reversed and ordered the writ granted. The Eleventh Circuit held that the state trial judge in Witt's case had violated the *Witherspoon* rule by excusing a venireman who admitted that she was "afraid" that her views against capital punishment would "interfere" with her sitting as a juror, but who never unequivocally stated that she could not vote for the death penalty.[50] The Supreme Court reversed.

The *Witt* Court addressed both the standard of exclusion of a venireman who expresses qualms about the death penalty and the standard for review of a state court determination on a *Witherspoon* issue. The Court concluded that *Adams* had stated the proper standard for determining when a prospective juror may be excluded for cause,[51] and that the language in *Witherspoon* to the effect that a venireman could be excluded only if he would "automatically" vote against the death penalty was mere dicta.[52] Further, the Court observed that a juror's bias against capital punishment need not be proved with "unmistakable clarity," because many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear."[53] These veniremen, the Court noted, "may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings."[54] In such

46. 448 U.S. at 50, 100 S. Ct. at 2529.

47. Id. at 45, 100 S. Ct. at 2526 (emphasis added).

48. 469 U.S. 412, 105 S. Ct. 844 (1985).

49. Id. at 424, 105 S. Ct. at 852.

50. Witt v. Wainwright, 714 F.2d 1069, 1081-82 (11th Cir. 1983), modified, 723 F.2d 769 (1984), rev'd, 469 U.S. 412, 105 S. Ct. 844 (1985).

51. 469 U.S. at 424, 105 S. Ct. at 851. See supra note 47 and accompanying text.

52. See id. at 422, 105 S. Ct. at 851 (noting that "[t]he [*Witherspoon*] Court's holding focused only on circumstances under which prospective jurors could not be excluded; under *Witherspoon*'s facts it was unnecessary to decide when they could be.").

53. Id. at 424, 105 S. Ct. at 852.

54. Id. at 425, 105 S. Ct. at 852.

situations, the Court indicated, a reviewing court should defer to the decision of the trial judge who saw and heard the veniremen.[55]

Applying this rationale, the Court concluded that the findings of the trial judge who granted exclusion of a venireman for cause on *Witherspoon* grounds in Witt's case were entitled to a "presumption of correctness."[56] The Court declined to adopt a rule that would have made review of trial court decisions on exclusion of jurors for cause in capital cases more strict than in others.[57] The Court also observed that, in most instances, the trial transcript should be sufficient to determine whether the dictates of *Witherspoon* were met. The Court found it "noteworthy that in this case the [trial] court was given no reason to think that elaboration was necessary; defense counsel did not see fit to object to [the excluded venireman's] recusal, or to attempt rehabilitation."[58] Thus, *Witt* appears to accept the principle that defense counsel should be permitted to participate fully in the voir dire process.[59]

Despite the substantial narrowing of the *Witherspoon* rule that has taken place in the nearly twenty years since the case was decided, the Supreme Court has never diverged from the central tenet of the rule: a venireman may not be excluded merely because he has some qualms about the death penalty. The real focus of the cases subsequent to *Witherspoon* has been on what constitutes sufficient evidence of a *Witherspoon* error. Where, as in the scenario outlined in the introduction to this article, it can be shown that a *Witherspoon* error occurred due to the ineffective representation of counsel and that such an error prejudiced the defendant, he arguably is entitled to relief. Each of these issues, ineffective assistance and prejudice, will be considered in turn below.

B. *Ineffective Representation in Voir Dire*

It is well established that a criminal defendant has the right to effective representation at all phases of the proceedings against him.[60]

---

55. See id. at 426, 105 S. Ct. at 853.

56. See id. at 428, 105 S. Ct. at 854 (citing 28 U.S.C. § 2254(d) (1985)).

57. Id. at 429, 105 S. Ct. at 855.

58. Id.

59. See J. Ferguson, Jury Voir Dire at 8, reprinted in The Death Penalty: Trial & Post-Conviction (1987) (noting that the *Witt* Court's observation "strongly suggests a right of defense counsel to question a juror who has been challenged.").

60. The right to counsel attaches at the formal initiation of adversary judicial proceedings, "whether by way of formal charge, preliminary hearing, indictment, information or arraignment." Kirby v. Illinois, 406 U.S. 682, 689, 92 S. Ct. 1877, 1882 (1972). Counsel's performance at any phase of a criminal proceeding may be challenged as ineffective. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574 (1986) (holding that counsel's failure to conduct pre-trial discovery and consequent failure to raise fourth amendment objections constituted ineffective assistance).

Undoubtedly, then, a capital defendant could not be denied entirely the assistance of counsel during the voir dire phase of his trial. Similarly, direct limitations on trial counsel's opportunity to make objections or to attempt to rehabilitate *Witherspoon* excluded veniremen undoubtedly are impermissible.[61] Because that is so, the failure of counsel to object or to attempt to rehabilitate a *Witherspoon* excluded venireman arguably also amounts to an impermissible denial of the right to counsel during voir dire proceedings. This proposition has at least limited support in the case law.

In *O'Bryan v. Estelle*,[62] for example, the court implied that defense counsel has an obligation to attempt to rehabilitate a venireman when the state's questioning suggests that the venireman should be excluded for cause. The court noted that the state had made such a showing in the case of one of the venireman.[63] "If the defense wished to rehabilitate" the venireman, the court suggested, it was incumbent upon defense counsel to do so on the record.[64] The defense counsel in *O'Bryan* had failed to do. As a consequence, the court held that the record sufficed to support the exclusion of the venireman.[65]

In *Bass v. Estelle*,[66] the same court went even further toward suggesting that defense counsel has a duty to rehabilitate a *Witherspoon* excluded venireman.[67] In his application for a writ of habeas corpus and in his subsequent appeal, the defendant complained of "[c]ounsel's failure to exercise the fundamental right of cross-examination in regards to *Witherspoon* jurors."[68] The court observed that defense counsel's failure to object to the exclusion of the venireman in question could have resulted from a tactical decision, but concluded that the issue could not be resolved from the available record. The court therefore remanded

---

61. See *Witt*, 469 U.S. at 430, 105 S. Ct. at 855; see also O'Connell v. State, 480 So. 2d 1284, 1286 (Fla. 1985) (holding that trial court's refusal to permit defense counsel to question *Witherspoon* excluded veniremen violated due process); White v. State, 629 S.W.2d 701 (Tex. Crim. App. 1981), cert. denied, 456 U.S. 938, 102 S. Ct 1995 (1982); Rougeau v. State, 651 S.W.2d 739 (Tex. Crim. App. 1982). But see Trujillo v. Sullivan, 815 F.2d 597, 607 (10th Cir.), cert. denied, 108 S. Ct. 296 (1987) (no error for court to conduct voir dire alone); State v. James, 431 So. 2d 399, 403 (La.), cert. denied, 464 U.S. 908, 104 S. Ct. 263 (1983) (no error where state had peremptory challenge available); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977) (no error to deny defense counsel opportunity to ask questions after veniremen indicated opposition to the death penalty).

62. 714 F.2d 365 (5th Cir. 1983), cert. denied, 465 U.S. 1013, 104 S. Ct 1015 (1984).

63. Id. at 376.

64. Id. at 376-77.

65. Id. at 377.

66. 696 F.2d 1154 (5th Cir.), cert. denied, 464 U.S. 865, 104 S. Ct. 200 (1983).

67. The court noted that the defendant had raised this issue on appeal from a denial of his request for a writ of habeas corpus. See id. at 1160.

68. Id.

the case for a hearing on this claim.[69] In issuing this order, the *Bass* court clearly assumed that, depending on the results of the evidentiary hearing, an ineffective assistance claim could be asserted with respect to the attorney's handling of *Witherspoon* problems during the voir dire.

Further support for the duty of defense counsel to counter *Witherspoon* objections is found in *Jurek v. Estelle*.[70] On review of denial of a habeas corpus petition, the *Jurek* court concluded that the exclusion of a particular venireman was clear error in light of her statement at voir dire that she could impose the death penalty if she thought the facts required it.[71] The court then faced the question whether the defendant had waived the *Witherspoon* error by failing to enter a timely objection at trial.[72] The court held that the claim was not barred because the defendant could show cause for his failure to object; namely, his counsel's ineffective performance.[73] In particular, the court noted:

> [Defendant's] appointed trial counsel was ignorant of the *Witherspoon* decision (then five years old) or completely misunderstood it. Not only did he fail to object to [a particular venireman's] exclusion from the jury; when other potential jurors expressed misgivings about capital punishment he did not press for clarification or attempt to see if *Witherspoon* protected them. He did not mention *Witherspoon* during the voir dire and seems not to have phrased a single question in a way designed to take advantage of it.[74]

The appeals court also noted that the district court had held an evidentiary hearing on defendant's petition for habeas corpus relief and that, even after defendant's counsel had been apprised of his potential mistake by the filing of the petition, he demonstrated by his testimony at the hearing that he still did not understand the *Witherspoon* holding.[75] The court declined to hold expressly that the defendant was denied the

---

69. Id.

70. 593 F.2d 672 (5th Cir. 1979), vacated on other grounds, 623 F.2d 929 (1980), cert. denied, 450 U.S. 1001, 101 S. Ct. 1709 (1981).

71. Id. at 680.

72. In a series of decisions culminating in Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497 (1977), the Supreme Court linked the availability of federal habeas corpus relief to the defendant's compliance with state rules that govern the manner of raising objections, such as the quite common "contemporaneous objection" rule. According to those decisions, when the defendant fails to comply with such a procedural rule, he may not raise his claim in a federal habeas corpus proceeding unless he can establish "cause" for his failure and "prejudice" resulting from that failure.

73. 593 F.2d at 682.

74. Id.

75. Id.

effective assistance of counsel, but did hold that the defendant had established "cause" for his failure to raise the *Witherspoon* issue at trial.[76]

Despite the suggestion in the case law that a claim of ineffective assistance can be maintained with regard to defense counsel's conduct of the voir dire in a capital case, there are several reported decisions that appear, at least at first blush, to deny this possibility. The bulk of these cases are bottomed on the notion that the examination of prospective jurors during voir dire is an "art" and that defense counsel's examination strategy generally cannot be criticized.

Typical of these cases is *Moore v. Maggio*.[77] The defendant, on appeal from the denial of a petition for writ of habeas corpus, contended that he had been deprived of the effective assistance of counsel when his attorney failed to rehabilitate one of the *Witherspoon* excluded jurors. Although the court did not reject the defendant's claim outright, it did, after reviewing the record, determine that the attorney rendered effective assistance. The court was impressed by the fact that the attorney decided to forgo attempting to rehabilitate the juror in question only after attempting unsuccessfully to rehabilitate three others.[78] In reaching its conclusion, the *Moore* court evidently applied *Strickland*'s "strong presumption"[79] that counsel's conduct falls within the range of professional competence. Read broadly, the *Moore* opinion, along with several others like it, suggests that this presumption extends to all of an attorney's conduct during voir dire, including his failure to attempt to rehabilitate or to object to the exclusion of *Witherspoon* jurors.[80]

That defense counsel's decision not to object or to attempt to rehabilitate excluded veniremen may, in many instances, be attributed to trial strategy, does not, however, mean that such omissions can never

---

76. Id. Under the law of federal habeas corpus, where a petitioner forfeits state review of a claim, federal habeas corpus review is barred absent a showing that there is "cause," such as the ineffectiveness of counsel, for the failure to raise the issue. See Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497 (1977).

77. 740 F.2d 308 (5th Cir. 1984), cert. denied, 472 U.S. 1032, 105 S. Ct. 3514 (1985).

78. Id. at 317.

79. See *Strickland*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069 (1984).

80. See, e.g., Hyman v. Aiken, 1984 W.L. 13988 (Magistrate's Report), adopted in part, 606 F. Supp. 1046, 1071 (D.S.C. 1985), vacated, 777 F.2d 938 (4th Cir. 1985), vacated, 478 U.S. 1016, 106 S. Ct. 3327 (1986) (noting that voir dire is largely a tactical decision); Collins v. State, 271 Ark. 825, 834, 611 S.W.2d 182, 189, cert. denied, 452 U.S. 973, 101 S. Ct. 3127 (1981) (holding that counsel's decision not to question a particular *Witherspoon* excluded venireman is within the realm of trial strategy); State v. Prejean, 379 So. 2d 240, 243 (La. 1979), cert. denied, 449 U.S. 891, 101 S. Ct 253 (1980) (holding that failure to rehabilitate was a tactical decision); Commonwealth v. Szuchon, 506 Pa. 228, 484 A.2d 1365, 1379 (1984) (holding that counsel's failure to attempt to rehabilitate some, but not all, *Witherspoon* excluded veniremen was a tactical decision).

amount to ineffective assistance. Consider, again, the scenario presented in the introduction to this article. Defendant's counsel clearly did not deliberately choose to forgo either objecting to the exclusion or rehabilitating the veniremen. Like the attorney in *Jurek*, he was barely aware of the dictates of *Witherspoon*, much less the suggestion of many commentators that objection to the exclusion of veniremen who express conscientious objections to the death penalty is essential to the conduct of an effective defense of a capital case.[81] In such a case, a court should be willing to look past the possibility that in other cases failure to object or to attempt rehabilitation may be the product of trial strategy. In such a case, by counsel's own admission, he has not employed such a strategy.

In several other decisions, courts have suggested that where a venireman makes it absolutely clear that he would *never* impose the death penalty, the failure of defense counsel to question the venireman further is not ineffective assistance. In *Burris v. State*,[82] for example, the Indiana Supreme Court reviewed a claim that the capital defendant's trial counsel had performed ineffectively during the voir dire.[83] The court concluded that trial counsel's failure to object to the exclusion of veniremen or to attempt to rehabilitate them was protected by a "presumption of competency."[84] The court referred to the transcript of the voir dire, in which the excluded veniremen stated that he would never recommend imposition of the death penalty, no matter what the evidence revealed.[85] The reviewing court suggested that, once the state had elicited such an answer, it may be impossible for defense counsel to rehabilitate such veniremen. Other courts have stated this proposition directly.[86]

---

81. See, e.g., Balske, New Strategies for the Defense of Capital Case, 13 Akron L. Rev. 331, 349 (1979) ("Whenever a prosecutor challenges a juror for cause, . . . you should immediately request an opportunity to inquire further."); Balske, The Demise of the *Witherspoon* Test and Other Important Developments in Death Penalty Defense, Champion, April 1985, at 23-24 (suggesting that rehabilitation is particularly important under *Witt* standard); Ferguson, supra note 59, at 4 ("[d]efense counsel should object to the challenge for cause and ask for an opportunity to further question the juror concerning the juror's view on the death penalty . . . ."); Goodpaster, supra note 8, at 326 ("Defense counsel has an advocacy obligation . . . to prevent the discharge for cause of jurors generally opposed to the death penalty."); McNally, *Wainwright v. Witt*, Advocate, April 1985 (suggesting that rehabilitation is important under *Witt* standard).

82. 465 N.E.2d 171 (Ind. 1984), cert. denied, 469 U.S. 1132, 105 S. Ct. 816 (1985).

83. Id. at 192.

84. Id. at 193.

85. Id. at 177-78.

86. See Stringer v. Scroggy, 675 F. Supp. 356, 362 (S.D. Miss. 1987) (holding that where veniremen's opposition to death penalty was not ambiguous, defense counsel had no duty to attempt to rehabilitate); Foster v. State, 748 S.W.2d 903, 906 (Mo. Ct. App. 1988) (holding that defendant was not prejudiced by counsel's failure to rehabilitate

The *Burris* decision and similar opinions, however, do not stand for the proposition that the failure of trial counsel to rehabilitate excluded veniremen or to object to their exclusion is unreviewable in *every* case. Clearly, in some instances questioning by the state (or the trial court) will not produce an unambiguous record that the venireman's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[87] The excluded venireman might, as in the scenario presented at the outset of this article, simply state that his deliberations *might* prevent him from imposing the death penalty. Such a possibility, however, does not necessarily support the conclusion that the venireman is excludable for cause. In such instances, questioning by the defense attorney might well affect the court's decision whether to exclude the venireman.

In *Ex parte Williams*,[88] for example, the prosecutor asked a venireman whether the possibility of imposing the death penalty would affect his deliberations:

> [PROSECUTOR]: In other words, sir, is it going to have some effect on you deliberating knowing if you find the man guilty he can possibly die and you have stated that you are opposed to the death penalty? Is that going to affect you in your deliberations in making that decision?
> [VENIREMAN]: Yes.
> [PROSECUTOR]: It will affect you?
> [VENIREMAN]: Yes.
> [PROSECUTOR]: Challenge for cause, Your Honor.[89]

The trial court initially granted the motion to excuse for cause. Defendant's counsel, however, noting that "[t]here is a possibility this person doesn't understand,"[90] requested and was granted the opportunity to question the venireman further. Although framed in response to somewhat "inartful questions," the venireman's answers eventually indicated that "he would not have any qualms about giving 'a guy' the death penalty in the proper case."[91] Despite this statement, the trial court again granted the motion to excuse for cause. Reviewing this record on

---

veniremen where it was doubtful that they could be rehabilitated); State v. Bradley, 1987 W.L. 17303 (Ohio Ct. App. 1987) (noting that trial counsel could have determined from excluded veniremen's answers that any effort at rehabilitation would prove fruitless); LeVasseur v. Commonwealth, 225 Va. 564, 304 S.E.2d 644, 655 (1983), cert. denied, 464 U.S. 1063, 104 S. Ct. 744 (1984) (noting that rehabilitation can have little effect when voir dire has already disclosed that juror's state of mind warrants his exclusion for cause).

87. See *Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 852 (1985).

88. 748 S.W.2d 461 (Tex. Crim. App. 1988) (en banc).

89. Id. at 462.

90. Id. at 463.

91. Id.

appeal, the court concluded that there was a possibility that the excluded venireman's original statement that the death penalty could "affect" his deliberations meant only that "'the potentially lethal consequences of [his] decision would invest [his] deliberations with greater seriousness and gravity or would involve [him] emotionally.'"[92] The *Williams* decision thus shows the critical importance of additional questioning by the defense attorney that is calculated to rehabilitate the challenged venireman.

Another recent opinion of the same court, *Hernandez v. State*,[93] illustrates a related point: an appellate court, when reviewing a trial court's decision to dismiss a venireman on account of his scruples about the death penalty, should look to the entire record, including any responses that the venireman might have given to rehabilitative questions posed by defense counsel. In *Hernandez*, the court held that where a venireman had merely stated that he could not personally kill another human being, the record was insufficient to justify exclusion of the venireman for cause.[94] The *Hernandez* court noted that a reviewing court was not bound to defer to a trial judge's view of the demeanor of a venireman unless "a careful reading of all testimony and other evidence, if any, demonstrates an ambiguity that cannot fairly be resolved on the face of the record . . . ."[95] Clearly, statements from a venireman in response to rehabilitative questions from defense counsel could help to overcome the presumption that the trial court's ruling on the exclusion of the venireman was correct.

Taken together, *Williams* and *Hernandez* suggest that defense counsel may, in certain circumstances, have a duty to rehabilitate a challenged venireman either to convince the trial court that it should not exclude him or to create a record sufficient to enable a reviewing court to determine whether he was properly excluded. A venireman's affirmative answers to a limited set of questions about whether he has qualms about the death penalty do not suffice to insulate a trial court's decision to exclude the venireman from review. Clearly, a venireman may equivocate initially and yet, if questioned properly, ultimately state that he could consider the death penalty in an appropriate case.[96]

In light of the decisions reviewed above, one can make the following generalizations. Because it is possible that additional questioning can more fully elucidate the views of a venireman who is challenged because

---

92. Id. at 464 (quoting Adams v. Texas, 448 U.S. 38, 100 S. Ct. 2521 (1980)).

93. 1988 W.L. 66884 (Tex. Crim. App. 1988).

94. Id.

95. Id.

96. See Gray v. Mississippi, 107 S. Ct. 2045, 2049 (1987) (indicating that, despite "somewhat confused" voir dire, venireman ultimately stated that she could consider the death penalty, and holding that exclusion of venireman was error).

of his reservations about capital punishment, defense counsel, in the usual case, is under an obligation to object to the exclusion of such a venireman and to attempt to rehabilitate him. If, as in the scenario presented in the introduction to this article, the defendant can establish that counsel's failure to object and rehabilitate was not the product of trial strategy and would not have been a useless exercise in light of the previous testimony of the venireman (that is, the venireman did not unequivocally state that he could *never* vote for death), then the court should find that counsel's performance fell below an "objective standard of reasonableness."

B. *Prejudice*

The second prong of the *Strickland* test for claims of ineffective assistance of counsel is whether "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different."[97] In cases where the defendant can establish that trial counsel failed entirely to consider objecting to the exclusion of a *Witherspoon* juror, there is some question regarding precisely what the defendant must show in order to satisfy this test of prejudice. Clearly, the defendant must demonstrate that the excluded venireman's answers to rehabilitative questions would have demonstrated that the venireman should not have been excluded, a burden that can be discharged, it will be argued below, only by questioning the venireman at a post-conviction hearing. Once the defendant makes this showing, the defendant need not, however, show that the exclusion of this particular venireman would necessarily have changed the jury's deliberations. As is true in the case of *Witherspoon* errors, once the defendant shows that a prospective juror was excluded improperly due to his trial counsel's defective performance, prejudice must be presumed.

Such a limited presumption of prejudice in cases of improper exclusion of veniremen as a result of ineffective assistance of counsel is consistent with the Supreme Court's rulings in *Strickland* and *Witherspoon*. The *Strickland* Court recognized that, in certain circumstances, it must be presumed that the denial of effective assistance of counsel causes prejudice to the defendant. Where the defendant is actually denied counsel, that is, when counsel is totally absent or is prevented from assisting the accused during a critical stage of the proceedings, prejudice is presumed.[98] The *Strickland* Court explained the rationale for this rule of presumed prejudice:

> Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Moreover, such

97. *Strickland*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068.
98. Id. at 692, 104 S. Ct. at 2067.

> circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.[99]

A more limited presumption of prejudice applies, the *Strickland* Court indicated, when the defendant's counsel acts under a conflict of interest.

> In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.[100]

Despite this presumption, the *Strickland* Court noted that, in order to prevail on a conflict of interest claim, the defendant must show that an actual conflict existed and that the conflict adversely affected defense counsel's performance.[101]

The *Strickland* Court's rationale for application of a presumption of prejudice in cases of denial of counsel or counsel's conflict of interest applies with equal vigor to cases where defense counsel's ineffective performance permits the occurrence of an error which, if properly objected to and presented on appeal, would constitute *per se* grounds for reversal of the trial court's judgment. First, in such cases, prejudice is so likely that a case-by-case analysis would not be worth the cost of the inquiry. Second, *per se* errors are generally easy to identify, both at the time that they occur (when they should be immediately rectified) and on the record (so that they can be identified and rectified, if necessary, on later review). Finally, *per se* errors generally concern fundamental rights, the effects of impairment of which, though sometimes difficult to measure, will invariably have an effect on the fairness of trial. For these reasons, courts should find that when a *per se* violation of a defendant's rights occurs as a result of the ineffectiveness of defense counsel, prejudice within the meaning of the *Strickland* test is presumed.[102]

---

99. Id. (citation omitted).

100. Id.

101. Id.

102. See, e.g., Penson v. Ohio, 109 S. Ct. 346, 354 (1988) (indicating that presumption of prejudice applies where defendant was denied counsel on appeal due to counsel's

This analysis of the relationship between *per se* errors and the presumption of prejudice under *Strickland* leads inexorably to the conclusion that *Witherspoon* errors attributable to incompetent counsel must be presumed to have prejudiced the defendant. Not long after handing down the *Witherspoon* opinion, the Supreme Court made it clear that courts may not treat violations of the *Witherspoon* rule as harmless under any circumstances. In *Davis v. Georgia*,[103] the Court summarily reversed a Georgia Supreme Court order and opinion which held that a single violation of the *Witherspoon* rule does not transgress a defendant's right to a jury representing a cross section of the community so long as there is no evidence of "'a systematic and intentional exclusion of a qualified group of jurors.'"[104] The United States Supreme Court concluded that *Witherspoon* established a stricter rule: "if a venireman is improperly excluded even though not [committed to vote against the death penalty regardless of the facts], any subsequently imposed death penalty cannot stand."[105]

The Supreme Court recently reaffirmed this *per se* rule of prejudice. In *Gray v. Mississippi*,[106] the Court considered whether violations of the *Witherspoon* rule should be subject to a harmless error analysis. The *Gray* Court concluded that the nature of the jury selection process defies any attempt to establish that an erroneous *Witherspoon* exclusion of a prospective juror is harmless.[107] The Court rejected the argument that an erroneous exclusion is harmless where the prosecutor retains unexercised peremptory challenges, noting that acceptance of such a rule would effectively insulate all jury selection errors from appellate review.[108]

---

withdrawal from representation); DeGrave v. United States, 820 F.2d 870, 872 (7th Cir. 1987) (suggesting that appellate counsel's failure to raise issue of court reporter's ex parte communication with jury may be considered *per se* prejudicial); Matire v. Wainwright, 811 F.2d 1430, 1439 (11th Cir. 1987) (holding that appellate counsel's failure to raise issue of prosecutor's comment on defendant's silence, a *per se* violation of the fifth amendment, provided a "near certainty" that defendant's conviction would have been reversed in the absence of the error); United States v. Butts, 630 F. Supp. 1145, 1149 (D. Me. 1986) (holding that, where ineffective assistance of counsel results in deprivation of defendant's right to testify, "prejudice is sufficiently proven, if not to be presumed"). Countervailing considerations such as the fact that some *per se* errors are not the exclusive fault of the government or the court, may suggest that the presumed prejudice may be overcome in certain circumstances. See *Strickland*, 466 U.S. at 692, 104 S. Ct. at 2067. The precise contours of the prejudice analysis of *per se* errors in the ineffective assistance of counsel context have yet to be mapped.

103. 429 U.S. 122, 97 S. Ct. 399 (1976) (per curiam).

104. Id. at 123, 97 S. Ct. at 399 (quoting lower court opinion in Davis v. Georgia, 236 Ga. 804, 809-10, 225 S.E.2d 241, 244-45 (1976)).

105. Id., 97 S. Ct. at 400.

106. 107 S. Ct. 2045 (1987).

107. Id. at 2055.

108. Id.

The Court also suggested that, in many instances, the erroneous exclusion of a venireman who merely expresses scruples concerning the death penalty will be part of a larger pattern in which the state seeks to exclude all scrupled, yet eligible, jurors either by challenge for cause or by peremptory challenge. As a consequence, the Court declared, "we cannot say that courts may treat [a particular] error as an isolated incident having no prejudicial effect."[109]

As the *Davis* and *Gray* decisions clearly reveal, any *Witherspoon* rule violation is *per se* prejudicial. Consequently, where a defendant's counsel, uninformed or indifferent to the *Witherspoon* rule, fails to object to the exclusion of a juror whom the trial court should not have excluded or where defendant's counsel fails to attempt to rehabilitate a juror whose answers to voir dire questions would have revealed that he should not have been excluded, the second element of *Strickland*'s test for ineffective assistance of counsel—prejudice to the defense—is satisfied.[110]

IV. Competing Interests in Admitting or Excluding the Testimony of Former Veniremen

When defense counsel fails to take appropriate measures to oppose the state's effort to excuse a *Witherspoon* juror, he may be guilty of rendering ineffective assistance. If the defendant in such a case challenges the competency of his counsel's performance, one question that arises is whether the defendant should be permitted to question the excluded venireman in a post-conviction proceeding regarding what answers he would have given to appropriate rehabilitative questions posed by competent defense counsel, assuming that the former venireman is available to testify. The value of permitting such testimony is obvious: it provides evidence critical to determining the merit of the defendant's claim that his former defense counsel's inadequate performance prejudiced him and allows the creation of an accurate record for review. Weighed against this interest in fairness and accuracy of judgments, however, is the general policy against interrogating former jurors after the verdict, a policy that may extend to former veniremen called to testify in post-

109. Id. at 2056.

110. This is not to say, of course, that in every instance where it can be shown that trial counsel was unaware of the *Witherspoon* rule the defendant will be presumed to have been prejudiced. The defendant must still show that if competent counsel had objected to the exclusion of the *Witherspoon* venireman and asked rehabilitative questions, the venireman's answers would have changed and that there is a "reasonable probability," (see *Strickland*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984)), that the trial court's ruling on the exclusion would have been different. In order to make this determination, of course, the reviewing court will have to receive the testimony of the *Witherspoon* excluded venireman.

conviction proceedings. This part addresses the balance between those interests.[111]

---

111. The suggestion that a former venireman should be permitted to testify in a post-conviction evidentiary hearing where the issue is whether trial counsel's ineffective assistance resulted in a *Witherspoon* error appears in Hyman v. Aiken, 1984 W.L. 13988 (Magistrate's Report), adopted in part, 606 F. Supp. 1046 (D.S.C. 1985), vacated, 777 F.2d 938 (4th Cir. 1985), vacated, 478 U.S. 1016, 106 S. Ct. 3327 (1986). In *Hyman*, a United States Magistrate issued a report and recommendation for disposition of the defendant's habeas corpus petition. The defendant alleged, *inter alia*, that his trial counsel had performed ineffectively during the voir dire phase of his trial. The Magistrate concluded that defendant's counsel was almost totally unfamiliar with the *Witherspoon* rule. The Magistrate also concluded that counsel had committed error by failing to see to it that a neutral jury was chosen. Turning to the question of prejudice, the Magistrate noted that at a post-conviction relief hearing, the defendant's new counsel had offered the testimony of a former venireman who would have testified that he could vote for the death penalty "for the appropriate, serious crime." The Magistrate noted, however, that this new testimony was "diametrically opposed" to his testimony during the voir dire, where he had stated that he would "automatically" vote against the death penalty. The Magistrate concluded that, given this statement, the question whether vigorous counsel could have rehabilitated any of these jurors "is purely speculative."

The district court in *Hyman* refused to accept the Magistrate's approach of comparing the excluded venireman's voir dire statements to his post-conviction testimony. Instead, the district court held that defense counsel's conduct was not unreasonable because counsel generally has no duty to rehabilitate venireman. See Hyman v. Aiken, 606 F. Supp. 1046, 1070 (D.S.C. 1985) ("The failure of counsel to be even totally unfamiliar with [*Witherspoon*'s] holding . . . would not be professional error per se.")

The Fourth Circuit vacated this opinion on grounds that an instruction during the sentencing phase of the defendant's trial was erroneous. See Hyman v. Aiken, 777 F.2d 938, 940 (4th Cir. 1985). The Fourth Circuit apparently concluded, however, that defense counsel had not performed ineffectively during the voir dire phase of the trial. See id. at 941 (holding that issue of incompetency during sentencing phase was moot and noting that defendant was not otherwise denied a fair trial).

The approach adopted by the Federal Magistrate in *Hyman* apparently has not been adopted in any other reported opinion. A similar approach has, however, been suggested in at least one dissenting opinion. In O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983), cert. denied, 465 U.S. 1013, 104 S. Ct. 1015 (1984), the majority concluded that the trial transcript revealed that veniremen were properly excluded because they appeared to be committed to automatically voting against the death penalty. Id. at 376-77. The dissent, however, suggested that the trial transcript was not unmistakably clear as to the views of excluded jurors and would have remanded the case for an evidentiary hearing. See id. at 400 (Buchmeyer, D.J., sitting by designation, dissenting). The dissent dismissed objections that in such an evidentiary hearing it would be too difficult to make a reliable determination of how the juror really felt and that it would not be possible to hold an evidentiary hearing several years after the original trial. Id. at 410. The dissent noted that evidentiary hearings were often held on difficult issues, such as claims that the defendant was denied effective assistance of counsel or was not mentally competent to stand trial. Id. Further, the dissent observed that retrospective determinations are often made well after a criminal trial is completed, in some instances as many as twenty years after the fact. Id. at 411. Finally, the dissent observed that an evidentiary hearing on the *Witherspoon* issue is the best solution to an otherwise difficult dilemma. If the hearing

A. *Interest in Fairness and Accuracy of Judgments*

In cases where a defendant challenges his counsel's performance during the voir dire phase of the trial, the testimony of a *Witherspoon* excluded venireman may become critical. Suppose, as in the introductory scenario, that the defendant can show that his counsel's failure to object to the exclusion of a particular venireman, or to attempt to rehabilitate him, was the product of incompetence. The defendant may not ask the reviewing court to presume that he was prejudiced on these facts alone. Rather, the defendant must show that had the venireman been properly questioned, his answers to voir dire questions would have been dramatically different than they were at the original trial. How is the defendant to make such a showing? Clearly, the original transcript is inadequate to the task. Since the questions were never asked, the answers do not appear. Only by calling the excluded venireman as a witness in the post-conviction proceedings can the defendant demonstrate that the venireman could have been rehabilitated. The testimony of the excluded venireman should, therefore, be admissible for these purposes.

This proposition draws support from several cases decided after *Witherspoon* in which no transcript of the voir dire was available. In those cases, the original transcript of the proceedings (containing the voir dire examination) failed to provide a sufficient basis for the reviewing court to determine whether the defendant's constitutional rights had been violated. The courts required, in those cases, supplements to the record to demonstrate what the excluded veniremen had said. Similarly, in the cases at issue in this article, the testimony of an excluded venireman may be necessary in order to show the prejudicial effects of defense counsel's inadequate representation.

Several cases decided shortly after the Supreme Court handed down *Witherspoon* illustrate the point. In some states prior to *Witherspoon*, it apparently was not common practice to transcribe voir dire examinations. Reviewing courts, confronted with the fact that there was no transcript of the voir dire phase and thus no basis upon which to review the question of whether *Witherspoon* violations had occurred, often ordered evidentiary hearings at which former veniremen testified. In

---

is not conducted, the reviewing court's only choice is either to affirm the death sentence (even though there may be lingering doubts about whether individual veniremen were properly excluded) or vacate the death sentence and order a new sentencing hearing (even though the apparent *Witherspoon* problem might have been resolved with sharper questioning). See id. at 412. The O'Bryan dissent, however, apparently has never been cited as authority for the proposition that *Witherspoon* excluded veniremen should be permitted to testify at evidentiary hearings in post-conviction proceedings involving claims of ineffective assistance of counsel.

Jackson v. Beto,[112] for example, no stenographic record of the voir dire examination of the veniremen was available. At a hearing on the petitioner's application for a writ of habeas corpus, the federal district court attempted to reconstruct the record of the voir dire examination by admitting testimony of the excluded veniremen regarding the questions the attorneys had put to them.[113] After reviewing this testimony, however, the district court concluded (and the appellate court agreed) that no violation of the *Witherspoon* rule had occurred.[114]

A number of other courts followed the *Jackson* approach of permitting former veniremen to testify in post-conviction evidentiary hearings regarding alleged *Witherspoon* violations.[115] The results in these cases are consistent with the well recognized rule that, as a matter of due process, a criminal defendant is entitled to an accurate record of the proceedings of his criminal trial in order to pursue post-conviction review.[116]

The rationale of the line of opinions emanating from *Jackson* applies with particular force in cases, such as that presented at the outset of this article, in which it is clear that trial counsel was unaware of or indifferent to the *Witherspoon* issue during the voir dire phase of the trial. In such cases, the question whether trial counsel's inadequate

---

112. 428 F.2d 1054 (5th Cir. 1970), vacated on other grounds, 408 U.S. 937, 92 S. Ct. 2866 (1972).

113. Id. at 1056.

114. Id. at 1057.

115. See, e.g., Gray v. Lucas, 677 F.2d 1086, 1098 (5th Cir. 1982) (no record of which jurors struck for cause and which struck peremptorily), cert. denied, 461 U.S. 910, 103 S. Ct. 3099 (1983); Alexander v. Henderson, 330 F. Supp. 812, 820 (W.D. La.) (former veniremen permitted to testify that they heard questions put to entire venire pool), aff'd, 459 F.2d 1391 (5th Cir. 1971), vacated on other grounds, 409 U.S. 1032, 93 S. Ct. 538 (1972); Tilford v. Page, 307 F. Supp. 781, 787 (W.D. Okla. 1969) (apparently no transcript of voir dire), vacated on other grounds, 408 U.S. 939, 92 S. Ct. 2873 (1972); Reid v. State, 478 P.2d 988, 996 (Okla. Crim. App. 1970), modified, 507 P.2d 915 (1973); Gaddis v. State, 497 P.2d 1087, 1089 (Okla. Crim. App. 1972) (parties entered into stipulation regarding questions during voir dire). But see McCorquodale v. Balkcom, 705 F.2d 1553, 1560 (11th Cir. 1983) (remanded, with directions to conduct new sentencing hearing rather than evidentiary hearing, where record showed that original voir dire was conducted en masse with veniremen asked to stand if they were opposed to capital punishment), cert. denied, 466 U.S. 954, 104 S. Ct. 2161 (1984); Van White v. State, 752 P.2d 814, 821 (Okla. Crim. App. 1988) (holding that post-trial evidentiary hearing including testimony of excluded veniremen would not be a satisfactory method of reconstructing voir dire examination that was never transcribed).

116. Townsend v. Sain, 372 U.S. 293, 319, 83 S. Ct. 745, 760 (1963) (noting that a transcript "is indispensable to determining whether the habeas applicant received a full and fair state-court evidentiary hearing resulting in reliable findings."); Griffin v. Illinois, 351 U.S. 12, 16, 76 S. Ct. 585, 589 (1956) (noting need for transcript in order to receive adequate appellate review); see also Britt v. North Carolina, 404 U.S. 226, 228, 92 S. Ct. 431, 434 (1971) (recognizing general value of transcript).

performance prejudiced the defendant cannot be decided on the record available to the reviewing court; the transcript of the trial proceedings is simply insufficient for this purpose. The only way to determine whether rehabilitative questions by defense counsel would have elicited favorable answers from the excluded venireman is to receive the testimony of the venireman in an evidentiary hearing.[117]

In light of the considerations reviewed above, one can argue forcefully that where the defendant can show that trial counsel ignored or was unaware of the *Witherspoon* rule and, as a result, may have allowed a *Witherspoon* error to go unchecked, the testimony of the former veniremen is vitally important to the determination of whether counsel's deficient performance prejudiced the defense. In such a case, unless other interests outweigh the defendant's interest in obtaining full and fair post-conviction review, the court should admit the testimony of the former venireman.

B. *Interests in Forbidding Testimony by Former Veniremen*

Some of the chief barriers to introducing the testimony of a former venireman are found in the policies that underly the rule against impeaching verdicts on the basis of testimony provided by former jurors. Before outlining these policies and demonstrating how they affect the present issue, it will be helpful first to review the rule itself.

The common law of England long held that a criminal defendant may not call former jurors to testify in post-conviction proceedings

---

117. This conclusion is consistent with the ordinary practice in post-conviction proceedings of holding evidentiary hearings on claims of ineffective assistance of counsel. See Goldsmith, Ineffective Assistance, at 28, in The Death Penalty: Trial and Post-Conviction (1987) (noting that, especially in capital cases, it is not unusual for state post-conviction proceedings concerning ineffectiveness of counsel to last longer than the original trial). Courts have conducted such hearings in a variety of settings where it was impossible to determine the merits of the defendant's claims without receiving testimony on matters not contained within the original transcript of proceedings. See, e.g., Thames v. Dugger, 848 F.2d 149, 151 (11th Cir. 1988) (holding that complete transcript of evidentiary hearing was required to address claim of ineffective assistance of counsel in failing to request severance); Porter v. Wainwright, 805 F.2d 930, 940 (11th Cir. 1986) (holding that evidentiary hearing was required to assess conflict of interest claim between defendant and his counsel), cert. denied, 107 S. Ct. 3195 (1987); Thomas v. Zant, 697 F.2d 977, 988 (11th Cir. 1983) (holding that evidentiary hearing may be required on claim of ineffective assistance of counsel in failing to investigate or prepare for penalty phase of trial); Jemison v. Foltz, 672 F. Supp. 1002, 1006 (E.D. Mich. 1987) (noting that evidentiary hearing was required to assess claim of ineffectiveness in failure, *inter alia*, to make opening or closing statements); Rock v. Zimmerman, 586 F. Supp. 1076, 1078 (M.D. Pa. 1984) (noting that evidentiary hearing was conducted on issue of whether counsel was ineffective in failing to present evidence of defendant's good character or in failing to move to suppress physical evidence).

concerning the substance of their deliberations.[118] The common law rule, which became firmly established in American law early on,[119] has been codified in many American jurisdictions. The Federal Rules of Evidence, for example, provide as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.[120]

Several states have modeled their rules on this Federal Rule.[121]

The Federal Rule and similar codifications of the common law rule are not, of course, directly aimed at forbidding a former *veniremen* from testifying in post-conviction proceedings. Rather, such rules forbid only the testimony of a former *juror*. Excluded veniremen, by definition, never served as jurors. Further, these rules do not forbid the testimony of a juror on every matter concerning his service. Rather, they serve to deflect "inquiry into the validity of a verdict or indictment," and specify only that the juror may not testify about "the jury's deliberations."[122] An excluded venireman clearly will not, and indeed could not, testify about anything having to do with the verdict or the jury's deliberations.

As was suggested earlier, however, it is not these rules themselves, but rather the various policies underlying them, that may stand in the way of permitting former veniremen to testify in post-conviction proceedings. The federal and companion state rules rest upon policy considerations that are as old as the original common law rule.[123] The

---

118. See, e.g., Vaise v. Delaval, 99 Eng. Rep. 944, 1 T.R. 11 (K.B. 1785) (holding inadmissible jurors' affidavits indicating that verdict had been reached by lot).

119. See Mattox v. United States, 146 U.S. 140, 148-49, 13 S. Ct. 50, 52-53 (1892) (holding jurors' affidavits admissible only for purpose of demonstrating extraneous prejudicial influence); see generally 8 J. Wigmore, Evidence § 2352, at 696-97 (1961).

120. Fed. R. Evid. 606(b).

121. See, e.g., Ark. Stat. Ann. § 16-41-101, Rule 606 (1987); Cal. Evid. Code § 1150 (1988); Fla. Stat. Ann. § 90.607 (West 1979); La. Code Evid. art. 606 (1989); N.C. Gen. Stat. § 8C, Rule 606 (1988); Okla. Stat. tit. 12, § 2606 (1980).

122. Fed. R. Evid. 606(b).

123. See S. Rep. No. 1277, 93d Cong., 2d Sess. 13 (1974) (noting that Rule 606(b) "embodied long-accepted Federal law"); Fed. R. Evid. 606(b), advisory commitee note, (noting history of policy).

United States Supreme Court summarized these policy considerations as early as 1915:

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.[124]

The policy considerations recited in this passage, which the Supreme Court has recently reaffirmed,[125] are four in number: (1) admitting such testimony would expose every verdict to the possibility of reversal; (2) admitting such testimony might encourage collusion between the defendant and former veniremen; (3) admitting such testimony would encourage harassment of former veniremen by attorneys; and (4) admitting such testimony would inhibit frank discussions during jury deliberations. Each of these policy considerations, perhaps quite powerful in cases of impeachment of actual verdicts by former jurors, holds little force in the context of testimony by former veniremen.

The first consideration, that a rule permitting the testimony of former veniremen in post-conviction proceedings would expose every verdict to the possibility of reversal, reflects in reality, nothing more than a general concern for the finality of verdicts. The rule proposed here, however, would only rarely lead to the upsetting of a prior verdict. That is so because a rule allowing the admission of the testimony of a former *Witherspoon* excluded venireman would create only a very limited exception to the general anti-impeachment rule. Under this proposed exception, the court conducting the hearing could admit such testimony in capital cases only, and only those veniremen who had been excluded on *Witherspoon* grounds could testify. The actual petit jury members could not. Most importantly, the court could admit such testimony only if the defendant could first show that the original defense counsel's performance was inadequate. Only in such instances would it be necessary to determine whether, had defense counsel asked the proper rehabilitative

---

124. McDonald v. Pless, 238 U.S. 264, 267-68, 35 S. Ct. 783, 784 (1915).

125. See Tanner v. United States, 107 S. Ct. 2739, 2747 (1987) (quoting McDonald v. Pless and noting that "[s]ubstantial policy considerations support the common-law rule against the admission of jury testimony to impeach a verdict . . . .").

questions during voir dire, the venireman's answers would have been different.

In addition, the consequences of admission of such testimony would be extremely limited. The testimony, if credited, would only affect the imposition of the death sentence. Admitting the testimony, moreover, would not guarantee that the court would credit it. Nor would it assure that the defendant would be able to establish prejudice; the venireman might testify that, had he been questioned further by the prosecutor, he would have stated unequivocally that he could never impose the death penalty.[126] Thus, the court entertaining the post-conviction relief hearing could receive the testimony and still not grant relief.

Given that the rule proposed here does not seriously threaten the policy favoring finality of judgments, that policy must give way to the defendant's interest in obtaining a fair trial and the state's interest in the just resolution of the issues in certain circumstances.[127] In capital cases, where the defendant's life is at stake, courts should be "especially sensitive" to concerns of "procedural fairness."[128] As was noted earlier, there is virtually no way to resolve the issue of ineffective assistance of

---

126. See Smith v. Brewer, 444 F. Supp. 482 (S.D. Iowa 1978) (noting that party introducing former juror's testimony must show prejudice), aff'd, 577 F.2d 466 (8th Cir.), cert. denied, 439 U.S. 967, 99 S. Ct. 457 (1978).

127. See Fed. R. Evid. 606(b), advisory committee note ("[S]imply putting verdicts beyond effective reach can only promote irregularity and injustice."). Indeed, the Supreme Court has long recognized, in cases where the issue was whether a particular juror was biased against the defendant, that a hearing should be conducted to determine the truth of the allegations. See Smith v. Phillips, 455 U.S. 209, 215, 102 S. Ct. 1146, 1149 (1982) ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."). In such situations, the potential policy arguments against introduction of a former juror's testimony are outweighed by the interests of justice in pursuing the truth. See id. at 217, 102 S. Ct. at 1150 n.7 (rejecting objection that hearing on bias of juror will turn upon the testimony of juror in question and quoting Dennis v. United States, 339 U.S. 162, 171, 70 S. Ct. 519, 523 (1950), to the effect that "one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter.").

128. The Supreme Court has frequently reiterated the view that death cases are "different" because of the finality of the penalty, and, thus, merit particular scrutiny of the fairness of the procedures employed. Reid v. Covert, 354 U.S. 1, 77, 77 S. Ct. 1222, 1262 (1957) (Harlan, J., concurring) ("[C]apital cases . . . stand on quite a different footing than other offenses. In such cases, the law is especially sensitive to . . . procedural fairness . . . ."); see also California v. Ramos, 463 U.S. 992, 998-99, 103 S. Ct. 3446, 3450 (1983); Eddings v. Oklahoma, 455 U.S. 104, 117-18, 102 S. Ct. 869, 875 (1982) (O'Connor, J., concurring); Beck v. Alabama, 447 U.S. 625, 637, 100 S. Ct. 2382, 2387 (1980) (Stevens, J., concurring); Woodson v. North Carolina, 428 U.S. 280, 303-04, 96 S. Ct. 2978, 2989 (1976) (plurality opinion). For a general treatment of the notion that "death is different," see J. Murphy, Cruel and Unusual Punishment, in Retribution, Justice and Therapy 223-49 (1979).

counsel in the jury selection phase, in particular whether counsel's errors prejudiced the defense, other than by considering the testimony of former veniremen. If the former defense counsel has not done his job in exploring the *Witherspoon* excluded venireman's background during the voir dire, he will know nothing of the answers that the venireman could have given to questions on rehabilitation. The choice may therefore well be between these alternatives: admit the testimony of veniremen in certain limited circumstances or accept the possibility that the defendant, who admittedly did not receive the effective assistance of counsel, will be put to death unjustly.

A second important policy served by the anti-impeachment rule, one that is closely related to that favoring the finality of jury verdicts, is the prevention of collusion between defendants and former jurors.[129] The danger of fraud in this context, however, is relatively slight. The court in a post-conviction proceeding has a mechanism by which to prevent, or at least to stem, the presentation of fraudulent or distorted testimony by former *Witherspoon* veniremen. Unlike the testimony of a juror regarding improprieties in jury deliberations, which cannot be compared to anything in the record, the testimony of a *Witherspoon* excluded venireman can easily be checked against the written transcript of the original voir dire proceedings. That transcript, of course, reflects the questions asked by the attorneys for the prosecution and the defense. If, on a review of the transcript, the trial court determines that the state and the defense fully explored the former venireman's attitudes toward capital punishment (and thus that there is no question of ineffective assistance of counsel), then the court can refuse to receive testimony concerning the answers the venireman might have given to additional rehabilitative questions. Where, however, as in the scenario presented in the introduction to this article, the transcript indicates that defense counsel made no effort to rehabilitate the *Witherspoon* excluded venireman and reveals that the questioning by the prosecution left an ambiguous record of the venireman's attitude toward capital punishment, the court, assuming it should receive the venireman's testimony, can do so with little fear of fraud or distortion. This is so because the written transcript of the original voir dire proceedings can be used as an after-the-fact check on abuses. If the testimony of the former venireman at the post-conviction hearing radically contradicts the testimony he gave

---

129. See, e.g., In re Beverly Hills Fire Litig., 695 F.2d 207 (6th Cir. 1982) (noting that rule against impeachment prevents jurors from manipulating system), cert. denied, 461 U.S. 929, 103 S. Ct. 2090 (1983); United States v. Eagle, 539 F.2d 1166 (8th Cir. 1976) (noting that central purpose of Rule 606(b) is to prevent fraud by individual former jurors), cert. denied, 429 U.S. 1110, 97 S. Ct. 1146 (1977).

in the original proceedings, the trial court may refuse to credit the new testimony.[130]

The third principal policy justification for the rule that forbids jurors to impeach their verdicts is the need to protect former jurors from harassment by attorneys. Again, as a general matter, the most potent answer to any objection based upon this policy is simply that the exception to the anti-impeachment rule proposed here is extremely limited. Furthermore, the danger of harassment seems remote. The topic of interest in a post-trial interview of a *Witherspoon* excluded venireman would have nothing to do with the juror's background, intelligence, handicaps, or relationships, the discussion of which might prove embarrassing to the juror. Rather, the concern is whether the juror understood the voir dire questions that the attorneys put to him concerning the death penalty and whether the excluded venireman's answers would have changed if defense counsel had made an effort to rehabilitate him.

Even if there is some possibility for harassment in these very limited circumstances, other methods of controlling potential abuses certainly are available. The ABA's Model Code of Professional Responsibility contains explicit provisions that forbid attorneys from asking former jurors questions "calculated merely to harass or embarrass the juror or to influence his actions in future jury service."[131] The ABA's Model Rules of Professional Conduct, adopted in 1983, apparently retain this prohibition.[132]

The final policy consideration noted above—that allowing the admission of testimony concerning the content of jury deliberations in post-conviction proceedings might inhibit frank discussions during those deliberations—is perhaps the most important concern underlying the rule forbidding the admission of such testimony.[133] This consideration, however, is wholly inapplicable in the case of testimony by a former venireman. A *Witherspoon* excluded venireman has participated in no jury deliberations, and his testimony threatens no disclosure of the thought processes of any of the actual jurors.[134]

---

130. See supra note 122 (discussing approach adopted by federal Magistrate in Hyman v. Aiken, 1984 W.L. 13988 (D.S.C. 1984)).

131. Model Code of Professional Responsibility DR 7-108(D) (1980); see also id., EC 7-29.

132. See Model Rules of Professional Conduct Rule 3.5 (1983); see generally Aronson, An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed, 61 Wash. L. Rev. 823, n.242 (1986).

133. See Fed. R. Evid. 606(b), advisory committee note ("Under the federal decisions the central focus has been upon insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation . . . .").

134. There may, of course, be other difficulties in conducting a post-conviction evidentiary hearing, especially if it takes place many years after the original trial. These

In view of the considerations reviewed above, it is clear that the traditional rationale for the anti-impeachment rule does not justify the exclusion of the testimony of former veniremen in post-conviction hearings aimed at determining whether a capital defendant's attorney provided effective assistance in the voir dire phase of the trial. The anti-impeachment rule is designed to protect the finality of the verdict, to prevent the harassment of jurors, and to insulate the deliberations of the jury. The proposal to permit *Witherspoon* excluded veniremen to testify regarding how they would have responded to appropriate rehabilitative questions represents a limited and justified exception to that rule.

V. CONCLUSION

There is little doubt that the most effective solution to the problem of ineffective assistance of counsel in capital cases is a better system of selecting and training trial counsel.[135] For some capital defendants, however, the damage is already done. For whatever reason—inexperience, indolence, indifference—there are prisoners sitting on death row for the simple reason that their lawyers failed to provide a minimally adequate level of representation.

Among those defendants there surely are some whose attorneys failed to screen carefully the veniremen who would sit in judgment on their lives, and in particular, failed to prevent the improper exclusion of "*Witherspoon* veniremen." The failures of the attorneys of these defendants allowed the state to "stack the deck"[136] against them by eliminating every venireman whose religious or moral scruples suggested any opposition to the death penalty.

These defendants face the difficult task of proving in post-conviction proceedings that their trial counsel failed to perform adequately in this most fundamental respect. In the few cases where the defendants can adduce such proof, the question becomes whether this professional incompetence prejudiced the defendant. To answer this question, the court must shift the inquiry to determine what a voir dire conducted by a reasonably effective attorney would have looked like. The former ex-

---

problems, such as the fading memories of former veniremen, do not appear insurmountable. See O'Bryan v. Estelle, 714 F.2d 365, 410-11 (5th Cir. 1983) (Buchmeyer, D.J., sitting by designation, dissenting); see also supra note 111 (describing *O'Bryan* opinion). In any event, since it is the defendant's burden in the first instance to prove his claim of ineffective assistance, to the extent that there may be problems in effectively proving certain matters in a post-conviction proceeding, the risk is entirely borne by the defendant, not the criminal justice system.

135. See Marshall, Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit, 86 Col. L. Rev. 1, 3-4 (1986).

136. See *Witherspoon*, 391 U.S. 510, 523, 88 S. Ct. 1770, 1777.

cluded venireman should, in such a case, be permitted to testify regarding how he would have answered appropriate rehabilitative questions. Courts faced with this situation simply cannot permit concerns for the finality and sanctity of jury verdicts to override the interests of justice.