The Burger Court Opinion Writing Database

Wainwright v. Witt

469 U.S. 412 (1985)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 30, 1984

Re: No. 83-1427 - Wainwright v. Witt

Dear Bill:

I join.

Regards,

WEB

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 9, 1984

No. 83-1427

Wainwright v. Witt

Dear Thurgood,

You and I were in dissent in the above. I will be happy to undertake the dissent.

Sincerely,

Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 30, 1984

No. 83-1427

Wainwright v. Witt

Dear Bill,

In due course, I shall circulate a dissent.

Sincerely,

Bill

Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1427

LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* JOHNNY PAUL WITT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[January ——, 1985]

JUSTICE BRENNAN, dissenting

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would affirm the judgment of the Court of Appeals for the Eleventh Circuit to the extent it vacates respondent Johnny Paul Witt's sentence of death. Even if I thought otherwise, however, I would vote to affirm the decision below in this case. If the presently prevailing view of the Constitution permits the State to exact the awesome punishment of taking a life, then basic justice demands that juries with the power to decide whether a capital defendant lives or dies not be poisoned against the defendant.

The Sixth Amendment jury guarantee "reflect[s] a profound judgment about the way in which law should be enforced and justice administered. . . . Providing an accused with the right to be tried by a jury of his peers [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan* v. *Louisiana*, 391 U. S. 145, 155–156 (1968). In *Witherspoon* v. *Illinois*, 391 U. S. 510, 521 (1968), the Court recognized that the voir dire practice of "death qualification"—the exclusion for cause, in capital cases, of jurors opposed to capital punishment—can danger-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

'84 JAN 18 P3:33

January 18, 1985

MEMORANDUM TO THE CONFERENCE

No. 83-1427

Wainwright v. Witt

In response to John Stevens' concurrence in the judgment in the above, I intend to add the attached footnote to my dissent. I plan no further substantive changes. A printed draft incorporating this footnote will circulate tomorrow morning.

Sincerely,

Bill

Attachment

INSERT footnote reference at end of first paragraph on page 11 (immediately above roman numeral II)

8. Reversing the Court of Appeals below, this Court places some weight on, and JUSTICE STEVENS concurring in the judgment gives determinative weight to, the fact that Witt's counsel did not object to the exclusion of prospective juror Colby. See ante, at 18, & n. 11, 21; ante, at 3 (STEVENS, J., concurring in the judgment). Because the state courts did not enforce a contemporaneous objection bar and thus ruled on Witt's claimed Witherspoon violation, the federal courts were of course free to consider the claim on a petition for habeas corpus. Ulster County Court v. Allen, 442 U.S. 140, 154 (1979). Nonetheless the Court relies on the failure to object either as evidence that Colby was not ambiguous in expressing her views, ante at 18, n. 11, or to suggest that defense counsel had some duty to attempt rehabilitation in order to resolve any ambiguities in Colby's testimony, ante, at 21. JUSTICE STEVENS relies on the failure to object as proof sufficient to rebut the argument that "the State's failure to make the kind of record required by Adams v. Texas constitutes an error so fundamental that it infects the validity of the death sentence in this case." Ante, at 3 (STEVENS, J., concurring in the judgment).

With respect to the Court's reliance on the failure to object, counsel's failure could be evidence of no more than a lack of competence or attentiveness. And I fail to see how any demeanor evidence, the existence of which the Court implies from

counsel's silence, could turn Colby's statement that she thought her views about capital punishment might interfere with her ability to judge guilt or innocence into an unmistakably clear declaration that she would be unable to follow instructions and abide by an oath. In any event, Witherspoon placed on defense counsel no burden to rehabilitate an ambiguous venireperson. As the Court of Appeals correctly held below, unless the prosecution resolves ambiguity to the extent of showing an unmistakably clear inability to follow the law, the juror may not be excluded.

With respect to the form of "harmless error" analysis in JUSTICE STEVENS' separate opinion, this Court has held on direct review that the improper exclusion of one prospective juror under Witherspoon precludes imposition of the death penalty irrespective of who replaces that prospective juror. Davis v. Georgia, 429 U.S. 122, 123 (1976). Particularly when a defendant's right to continue living is at issue, I fail to understand how an error held to be so fundamental as to preclude any harmless error analysis on direct review should be treated as any less fundamental on habeas corpus review.

STYLISTIC CHANGES THROUGHOUT
SEE PAGES: 1, 11

substantive footnote moved p. 11

To: The Chief Justice
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor
Justice Brennan

Circulated: JAN 19 1985

Recirculated: _____

Jan 19, 1985

SUPREME COURT OF THE UNITED STATES

No. 83-1427

LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* JOHNNY PAUL WITT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[January 21, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would affirm the judgment of the Court of Appeals for the Eleventh Circuit to the extent it vacates respondent Johnny Paul Witt's sentence of death. Even if I thought otherwise, however, I would vote to affirm the decision below in this case. If the presently prevailing view of the Constitution is to permit the State to exact the awesome punishment of taking a life, then basic justice demands that juries with the power to decide whether a capital defendant lives or dies not be poisoned against the defendant.

The Sixth Amendment jury guarantee "reflect[s] a profound judgment about the way in which law should be enforced and justice administered. . . . Providing an accused with the right to be tried by a jury of his peers [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan* v. *Louisiana*, 391 U. S. 145, 155–156 (1968). In *Witherspoon* v. *Illinois*, 391 U. S. 510, 521 (1968), the Court recognized that the *voir dire* practice of "death qualification"—the exclusion for cause, in capital

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

October 29, 1984

83-1427 - Wainwright v. Witt

Dear Bill,

Please join me.

Sincerely yours,

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 30, 1984

Re: No. 83-1427-Wainwright v. Witt

Dear Bill:

I await the dissent.

Sincerely,

TM.

T.M.

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 2, 1985

Re: No. 83-1427-Wainwright v. Witt

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.
T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 29, 1984

Re: No. 83-1427, Wainwright v. Witt

Dear Bill:

Please join me.

Sincerely,

Harry

Justice Rehnquist

cc: The Conference

HAB

February 14, 1985

Re: Holds for No. 83-1427, Wainwright v. Witt

Dear Bill:

It probably doesn't make any difference, but I believe that the petition for certiorari in No. 83-6655, Darden v. Wainwright, was formally denied on June 4, 1984. My records so indicate, and, indeed, the case appears on page 6 of the Order List of that date.

Sincerely,

HAB

Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 29, 1984

83-1427 Wainwright v. Witt

Dear Bill:

Please join me.

Sincerely,

Lewis

Justice Rehnquist

Copies to the Conference

LFP/vde

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: OCT 27 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1427

LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* JOHNNY PAUL WITT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[October ——, 1984]

JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires us to examine once again the procedures for selection of jurors in criminal trials involving the possible imposition of capital punishment, see *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), and to consider standards for federal courts reviewing those procedures upon petition for a writ of habeas corpus.

I

Respondent Johnny Paul Witt was convicted of first-degree murder in Florida and sentenced to death. The murder was committed while respondent and a friend were bow and arrow hunting. The evidence at trial showed that the two had spoken together on other occasions about killing a human, and had even stalked persons as they would stalk animal prey. On the day in question, respondent, then age 30, and his younger accomplice were hunting in a wooded area near a trail often used by children. When the victim, an 11-year old boy, rode by on his bicycle, respondent's accomplice hit the child on the head with a star bit from a drill. Respondent and his accomplice then gagged the stunned victim, placed him in the trunk of respondent's car, and drove to a deserted grove. Upon opening the trunk, the conspirators discovered that the victim had died by suffocating from the

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: NOV 1

STYLISTIC CHANGES THROUGHOUT

B. S, 10, 18, 19 & 21

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1427

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[November ——, 1984]

JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires us to examine once again the procedures for selection of jurors in criminal trials involving the possible imposition of capital punishment, see *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), and to consider standards for federal courts reviewing those procedures upon petition for a writ of habeas corpus.

I

Respondent Johnny Paul Witt was convicted of first-degree murder in Florida and sentenced to death. The murder was committed while respondent and a friend were bow and arrow hunting. The evidence at trial showed that the two had spoken together on other occasions about killing a human, and had even stalked persons as they would stalk animal prey. On the day in question, respondent, then age 30, and his younger accomplice were hunting in a wooded area near a trail often used by children. When the victim, an 11-year old boy, rode by on his bicycle, respondent's accomplice hit the child on the head with a star bit from a drill. Respondent and his accomplice then gagged the stunned victim, placed him in the trunk of respondent's car, and drove to a deserted grove. Upon opening the trunk, the conspirators discovered that the victim had died by suffocating from the

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: NOV

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1427

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[November ——, 1984]

JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires us to examine once again the procedures for selection of jurors in criminal trials involving the possible imposition of capital punishment, see *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), and to consider standards for federal courts reviewing those procedures upon petition for a writ of habeas corpus.

I

Respondent Johnny Paul Witt was convicted of first-degree murder in Florida and sentenced to death. The murder was committed while respondent and a friend were bow and arrow hunting. The evidence at trial showed that the two had spoken together on other occasions about killing a human, and had even stalked persons as they would stalk animal prey. On the day in question, respondent, then age 30, and his younger accomplice were hunting in a wooded area near a trail often used by children. When the victim, an 11-year old boy, rode by on his bicycle, respondent's accomplice hit the child on the head with a star bit from a drill. Respondent and his accomplice then gagged the stunned victim, placed him in the trunk of respondent's car, and drove to a deserted grove. Upon opening the trunk, the conspirators discovered that the victim had died by suffocating from the

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: JAN 3 1985

P.11

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1427

LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* JOHNNY PAUL WITT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[January ——, 1985]

JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires us to examine once again the procedures for selection of jurors in criminal trials involving the possible imposition of capital punishment, see *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), and to consider standards for federal courts reviewing those procedures upon petition for a writ of habeas corpus.

I

Respondent Johnny Paul Witt was convicted of first-degree murder in Florida and sentenced to death. The murder was committed while respondent and a friend were bow and arrow hunting. The evidence at trial showed that the two had spoken together on other occasions about killing a human, and had even stalked persons as they would stalk animal prey. On the day in question, respondent, then age 30, and his younger accomplice were hunting in a wooded area near a trail often used by children. When the victim, an 11-year-old boy, rode by on his bicycle, respondent's accomplice hit the child on the head with a star bit from a drill. Respondent and his accomplice then gagged the stunned victim, placed him in the trunk of respondent's car, and drove to a deserted grove. Upon opening the trunk, the conspirators discovered that the victim had died by suffocating from the

Stylistic Change ONLY

8 1 20

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: 1/17/85

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1427

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[January ——, 1985]

JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires us to examine once again the procedures for selection of jurors in criminal trials involving the possible imposition of capital punishment, see *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), and to consider standards for federal courts reviewing those procedures upon petition for a writ of habeas corpus.

I

Respondent Johnny Paul Witt was convicted of first-degree murder in Florida and sentenced to death. The murder was committed while respondent and a friend were bow and arrow hunting. The evidence at trial showed that the two had spoken together on other occasions about killing a human, and had even stalked persons as they would stalk animal prey. On the day in question, respondent, then age 30, and his younger accomplice were hunting in a wooded area near a trail often used by children. When the victim, an 11-year-old boy, rode by on his bicycle, respondent's accomplice hit the child on the head with a star bit from a drill. Respondent and his accomplice then gagged the stunned victim, placed him in the trunk of respondent's car, and drove to a deserted grove. Upon opening the trunk, the conspirators discovered that the victim had died by suffocating from the

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 14, 1985

MEMORANDUM TO THE CONFERENCE

Re: No. 83-1613 Wainwright v. Darden
No. 83-6655 Darden v. Wainwright
No. 83-6350 McCorquodale v. Balkcom

These petitions were held pending resolution of No. 83-1427, Wainwright v. Witt.

No. 83-1613 Wainwright v. Darden
No. 83-6655 Darden v. Wainwright

In Darden, the trial judge first informed the jury collectively that he would ask the following question:

> "I want to know whether each of you have such strong religious, moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require that recommendation?"

Defense counsel raised a general objection to the question, which was overruled. The trial judge then asked the same question of each veniremember individually, until he reached one Murphy. In response to general questions, Murphy told the judge that he had previously worked as an administrator at a seminary. The trial judge asked Murphy:

> "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 30, 1984

Re: 83-1427 - Wainwright v. Witt

Dear Bill:

I shall wait for the dissent.

Respectfully,

Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: JAN 16 19

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1427

LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* JOHNNY PAUL WITT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[January ——, 1985]

JUSTICE STEVENS, concurring in the judgment.

Because the Court's opinion contains so much discussion that is unnecessary to the resolution of this case, I am unable to join it.[1] Much of that discussion is inconsistent with the standard announced in *Adams* v. *Texas*, 448 U. S. 38 (1980), which the entire Court continues to endorse today.[2] The majority, however, does identify the facts that are critical to a proper disposition of this case.[3]

---

[1] I do agree with the Court's observation that dicta is not binding in future cases. See *ante*, at 9–10.

[2] The Court, *ante*, at 10, expressly endorses the following statement in the *Adams* opinion:

"As an initial matter, it is clear beyond a peradventure that *Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." *Adams* v. *Texas*, 448 U. S. 38, 47–48 (1980).

JUSTICE BRENNAN, in his dissent today, also endorses that standard. See *post*, at 12 (BRENNAN, J., joined by MARSHALL, J., dissenting).

[3] "Defense counsel did not object or attempt rehabilitation." *Ante*, at 3.

"In this regard it is noteworthy that in this case the court was given no reason to think that elaboration was necessary; defense counsel did not see

(5)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 5, 1984

No. 83-1427 Wainwright v. Witt

Dear Bill,

Please join me.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference