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Deference Spillover: The End of *Witherspoon* in Capital Appeals

ABSTRACT. In *Witherspoon v. Illinois*, the Supreme Court held that the state may not disqualify a capital juror based solely on their opposition to the death penalty. Sixty years later, that due-process principle is still good law. But as a matter of practice, *Witherspoon* is a mirage in capital appeals. Federal habeas courts have not overturned a death sentence based on *Witherspoon* error in more than a decade, and state courts do so only rarely.

This Comment explains why, providing the first complete account of how the Supreme Court eviscerated *Witherspoon*. It traces the doctrine's demise to the Court's adoption of an extraordinarily deferential standard of review — one that originated out of the federal habeas statute, yet which lower courts have now erroneously applied on direct appeal. This pattern of "deference spillover" risks the end of *Witherspoon* everywhere. However, if state courts decline to adopt this standard, they may still restore *Witherspoon*'s promise.

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I began to research *Witherspoon* through my work on a capital habeas case. I learned from a team of lawyers — tireless advocates and generous teachers — who have spent two decades fighting to save an innocent man from execution. This Comment is dedicated to them — including Miriam Gohara, George Kendall, and Carine Williams — and to our client, Chris Barbour.

COMMENT CONTENTS

INTRODUCTION

In April 1960, an Illinois jury sentenced William Witherspoon to death. Before his trial, the prosecution systematically removed nearly half of the venire for their "qualms" about the death penalty.[1] Of the forty-seven excused jurors, only five had stated they would vote against death no matter the circumstance.[2] By producing "a jury uncommonly willing to condemn a man to die," the Supreme Court held, Illinois had "stacked the deck" against Mr. Witherspoon.[3] To allow his execution by this "hanging jury" would "deprive him of his life without due process of law."[4]

Witherspoon v. Illinois and its progeny establish a core due-process principle: the state may not strike a prospective capital juror based solely on their general opposition to the death penalty. That principle is still good law. In practice, however, federal habeas courts have not overturned a death sentence based on *Witherspoon* error in more than a decade, even when trial courts clearly violated *Witherspoon*'s commands. This Comment explains why—offering the first full account of how the Supreme Court eviscerated *Witherspoon*'s promise. Though *Witherspoon*'s demise has a long tail, this Comment traces the doctrine's end to two habeas cases setting an extraordinarily deferential standard of review: *Uttecht v. Brown* and *White v. Wheeler*.[5] Together, *Uttecht* and *Wheeler* imposed the deference requirements of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to hollow out *Witherspoon*.[6] After *Wheeler*, no federal habeas petitioner has ever prevailed on a *Witherspoon* claim.

By their terms, *Wheeler* and *Uttecht* apply only to defendants seeking habeas relief in federal courts. But this Comment finds that their impact has extended far beyond federal habeas. The "double deference standard" that these cases announced derives from the statutory strictures of AEDPA, yet both state courts and federal courts sitting on direct appeal have cited *Uttecht* and *Wheeler* to justify the denial of *Witherspoon* claims. This Comment terms this phenomenon "deference spillover"—how deferential standards of review developed in the federal habeas context spill over into rulings by courts not bound by AEDPA.

By introducing the concept of deference spillover, this Comment offers a new gloss on a familiar critique of AEDPA—that it has frozen the development of constitutional law by creating a nearly insurmountable barrier to federal review

1. Witherspoon v. Illinois, 391 U.S. 510, 513 (1968).
2. *Id.* at 514.
3. *Id.* at 521, 523.
4. *Id.* at 523.
5. Uttecht v. Brown, 551 U.S. 1, 20 (2007); White v. Wheeler, 577 U.S. 73, 81 (2015) (per curiam).
6. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

of state-court convictions.[7] Giovanna Shay and Christopher Lasch have argued that the path to restarting this constitutional dialogue between state and federal courts is by seeking certiorari from state-court appeals.[8] Deference spillover suggests that even this path is foreclosed. Rather than exercising their discretion to interpret federal constitutional law, state courts are reflexively mimicking deferential standards of review from federal habeas that do not bind them. In the *Witherspoon* context, the Supreme Court has expressly clarified that the federal habeas standard of review does not bind state courts, who are free to set their own standards for reviewing juror bias.[9] But instead of heeding this guidance, state courts are regressing to AEDPA's baseline – deference to trial judges even in cases of clear error.[10] And foreclosing substantive review of *Witherspoon* error comes at an incalculable cost: the loss of fair juries for defendants facing death.

Empirical research confirms the high stakes of death qualification, the process by which life-leaning jurors are removed from the jury box. Aliza Plener Cover found that, in Louisiana, twenty-two percent of potential jurors in capital cases were struck for cause based on their opposition to the death penalty.[11] These strikes resulted in stark racial disparities: nearly sixty percent of the life-leaning Louisianians who were excused were Black.[12] In other words, one-third of all potential Black jurors were struck for their opposition to the death penalty alone.[13] As Brandon Garrett, Daniel Krauss, and Nicholas Scurich confirm, this effect has only intensified with time. Death qualification today excludes "far

7. *See* Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 Wm. & Mary L. Rev. 211, 230 (2008) (arguing that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) shut down the "dialogue" between federal and state courts on constitutional doctrine); *see also* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1044 (1977) (describing the writ of habeas corpus's potential to create federalism "dialogue" in order to "define and evolve constitutional rights").

8. *See* Shay & Lasch, *supra* note 7, at 230-31.

9. Greene v. Georgia, 519 U.S. 145, 146 (1996) (per curiam) ("*Witt* was a case arising on federal habeas, where deference to state-court findings is mandated by 28 U.S.C. § 2254(d). But this statute does not govern the standard of review of trial court findings by the Supreme Court of Georgia." (citing Wainwright v. Witt, 469 U.S. 412 (1985))).

10. *See infra* Section II.B (discussing the impact of deference in state courts); *see also infra* Section I.B (discussing the impact of deference in federal habeas).

11. Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 Ind. L.J. 113, 118 (2016) (surveying the eleven capital trials that occurred over a five-year period in Louisiana).

12. *Id.*

13. *Id.* (describing trends based on individualized venire-member racial data available for seven of those trials).

higher percentages of the population than ever before."[14] Meaningful appellate oversight of the death-qualification process through *Witherspoon* can serve as a safeguard against these trends, limiting the number of life-leaning jurors who are improperly struck. The doctrine ensures that a trial judge's impressions, often based on snap judgments during voir dire, are not the last word on whether a juror is impartial. By doing so, *Witherspoon* provides every capital defendant a second chance to demand that his jury represent a fair cross section of his community, including those who are opposed to the death penalty.

Despite the tide of deference spillover, some state courts have charted a different path. The California Supreme Court, in particular, has crafted more searching standards of review for identifying *Witherspoon* error. As a result, capital defendants in California continue to win reversals of death sentences imposed after trial judges improperly excluded life-leaning jurors. Other courts should follow by declining to adopt the federal habeas standard for reviewing death-qualification challenges. By doing so, these courts may still restore *Witherspoon*'s promise.

This Comment proceeds in three parts. Part I traces *Witherspoon* claims in the Supreme Court from *Witherspoon* to *Wheeler*, describing how federal courts applying these precedents in habeas cases have effectively foreclosed *Witherspoon* claims through complete deference under AEDPA. Part II analyzes state courts and federal courts hearing *Witherspoon* claims on direct appeal. It describes how non-habeas courts have seized on language from federal habeas cases governed by AEDPA to formulate their own deferential standards of review—the pattern of deference spillover. Because of this spillover, Section II.B illustrates, several state courts no longer find *Witherspoon* error, bringing the doctrine close to its end in state appeals too. Part III concludes with a path forward: state courts should develop their own standards for reviewing *Witherspoon* error—standards that do not mimic the extraordinary deference of federal habeas.

I. *WITHERSPOON-WITT* IN THE FEDERAL COURTS

A. *The Trajectory of* Witherspoon

Although the standard for reviewing *Witherspoon* claims on appeal has changed dramatically, *Witherspoon*'s core holding remains good law. *Witherspoon v. Illinois* recognized that the Sixth and Fourteenth Amendments bar the state from disqualifying a capital juror based solely on their "general objections to the

14. Brandon Garrett, Daniel Krauss & Nicholas Scurich, *Capital Jurors in an Era of Death Penalty Decline*, 126 YALE L.J.F. 417, 420 (2017).

death penalty."[15] A juror who "opposes the death penalty, no less than one who favors it, can make the discretionary judgment" to decide "the ultimate question of life or death."[16] Automatic exclusion of such life-leaning jurors would unduly "stack[] the deck" against a capital defendant in violation of their Sixth Amendment right to an impartial jury.[17] In a nation sharply divided in opinion on capital punishment, a jury that excludes life-leaning venire members "cannot speak for the community" as a whole, but only a "distinct and dwindling minority."[18]

In footnote 21 of *Witherspoon*, the Court provided a standard for disqualification: whether it is "unmistakably clear" that a juror would "*automatically* vote against the imposition of capital punishment" no matter what the trial might reveal.[19] The Court reaffirmed this high threshold for for-cause excusal in subsequent decisions vacating lower-court judgments denying *Witherspoon* relief: only "unambiguous[]" indications of an "automatic[] vote" against death disqualify a juror.[20]

The Burger Court abandoned that test seventeen years later in *Wainwright v. Witt*, which provides the controlling substantive standard applied today.[21] Under *Witt*, a juror may be excluded for cause because of his views on capital punishment where those "views would 'prevent or *substantially impair* the performance of his duties as a juror in accordance with his instructions and his oath.'"[22] The decision also adopted a lower standard of proof to meet this relaxed bar for excusal: after *Witt*, a trial judge no longer needed to identify a juror's bias with "unmistakable clarity." Instead, even if there is a "lack of clarity in the printed record," a judge with a "definite impression" of bias may properly excuse a life-leaning juror.[23] To justify this lower standard of proof, the Court emphasized that "deference must be paid to the trial judge who sees and hears the juror."[24]

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15. Witherspoon v. Illinois, 391 U.S. 510, 522 (1968).
16. *Id.* at 519.
17. *Id.* at 523.
18. *Id.* at 520.
19. *Id.* at 522 n.21. *Witherspoon* also set out a second test for disqualification with respect to determinations of guilt: a juror could be excluded if it was "unmistakably clear" that her "attitude toward the death penalty would prevent [her] from making an impartial decision as to the defendant's *guilt*." *Id.* The standard set out in *Witt* collapsed this distinction between impartiality as to sentencing and as to guilt.
20. Maxwell v. Bishop, 398 U.S. 262, 265 (1970) (describing the threshold for exclusion); *see also* Boulden v. Holman, 394 U.S. 478, 482 (1969) (same).
21. 469 U.S. 412, 424 (1985).
22. *Id.* (emphasis added) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).
23. *Id.* at 425-26.
24. *Id.* at 426.

Taken together, *Witt* shifted the "risk of a biased and unrepresentative jury" from the state to the capital defendant.[25] Where *Witherspoon* prohibited the "exclusion of the ambiguous, evasive, or uncertain juror," *Witt* allowed such a juror to be removed from the jury box.[26] And it did so by severely watering down *Witherspoon* to "vest[] judges with greater discretion to exclude scrupled jurors in capital cases," so much so that today courts refer to *Witherspoon* claims as *Witherspoon-Witt* claims.[27]

Witt's impact was especially pronounced in cases arising on federal habeas review. While *Witherspoon* itself made no mention of deference,[28] *Witt*—which was a federal habeas case—instructed federal courts to defer to state-court determinations of jury bias. The Supreme Court held that jury bias is a factual issue that warrants a "presumption of correctness" under the federal habeas statute, 28 U.S.C. § 2254(d).[29] And, as § 2254(d) was written when *Witt* was decided, factual findings "presumed correct" that were "fairly supported" by the record could be overturned only by "clear and convincing" evidence.[30] Applying this statutory instruction, *Witt* held that a trial court "aided . . . by its [demeanor] assessment" is "entitled to resolve [an ambiguous *Witherspoon* challenge] in favor of the State."[31]

Witt's effects in state courts were curtailed when the Supreme Court later clarified that *Witt* did not control "the standard of review to be applied by state appellate courts reviewing trial courts' rulings on jury selection."[32] In *Greene*, the

25. *Id.* at 453 (Brennan, J., dissenting).

26. *Id.* at 445. As Justice Brennan noted, ambiguous voir dire responses were a frequent basis for relief under *Witherspoon*. In the years after *Witherspoon*, the Supreme Court alone summarily reversed three state-court decisions where capital jurors were excluded because of "ambiguity . . . as to whether their views about capital punishment would affect their ability to be impartial." *Id.* at 446 (first citing Pruett v. Ohio, 403 U.S. 946 (1971); then citing Adams v. Washington, 403 U.S. 947 (1971); and then citing Mathis v. New Jersey, 403 U.S. 946 (1971)).

27. James M. Carr, Note, *At* Witt*'s End: The Continuing Quandary of Jury Selection in Capital Cases*, 39 STAN. L. REV. 427, 428 (1987) (citing *Witt*, 469 U.S. at 424-26); *see also* Stanton D. Krauss, *The* Witherspoon *Doctrine at* Witt*'s End: Death-Qualification Reexamined*, 24 AM. CRIM. L. REV. 1, 78 (1986) (describing how *Witt* expanded trial judges' discretion and decreased reviewability).

28. *Witherspoon* was heard on certiorari to the Illinois Supreme Court's denial of state habeas relief. Witherspoon v. Illinois, 391 U.S. 510, 513 (1968).

29. *Witt*, 469 U.S. at 426, 429. Before *Witt*, some courts had concluded that jury bias is a "mixed question of law and fact" not entitled to this presumption. *See* Darden v. Wainwright, 725 F.2d 1526, 1529-30 (11th Cir. 1984).

30. *Witt*, 469 U.S. at 431, 435; *see* 28 U.S.C. § 2254(d) (1982) (amended 1996).

31. *Witt*, 469 U.S. at 434.

32. Greene v. Georgia, 519 U.S. 145, 146 (1996) (per curiam) (internal quotation marks omitted); *see also id.* ("[The federal habeas] statute does not govern the standard of review of trial court findings by the Supreme Court of Georgia.").

Georgia Supreme Court had erroneously concluded otherwise, citing *Witt* as "'controlling authority' for a rule that appellate courts *must* defer to trial courts' findings" on jury bias.[33] The Court granted certiorari to correct that error and underscored that "*Witt* was a case arising on federal habeas," where deference is "mandated" by statute.[34] But the federal habeas statute "does not govern the standard of review" in state courts.[35] Put simply, *Greene* clarified that *Witt*'s ruling on deference was cabined to the federal habeas courts. Meanwhile, *Witt*'s *substantive* standard for when a trial judge could excuse a life-leaning juror—the "substantial impairment" test—applied everywhere.[36]

That was the state of the *Witherspoon* doctrine in 1996, when Congress passed AEDPA. AEDPA amended the federal habeas statute to command additional deference to state-court rulings. As amended, § 2254(d) instructs that a federal habeas petition

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was *contrary to, or involved an unreasonable application of, clearly established Federal law*, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an *unreasonable determination of the facts* in light of the evidence presented in the State court proceeding.[37]

Over the following years, the Rehnquist and Roberts Courts interpreted AEDPA case by case and doctrine by doctrine.[38] But there was an unmistakable through line: the maximalist imposition of AEDPA to constrict habeas. As Judge

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33. *Id.* at 145 (emphasis added) (quoting Greene v. State, 469 S.E.2d 129, 134-35 (Ga. 1996)).

34. *Id.* at 146.

35. *Id.*

36. *Id.* ("*Witt* is 'the controlling authority as to the death-penalty qualification of prospective jurors . . . .'" (quoting *Greene*, 469 S.E.2d at 134)).

37. 28 U.S.C. § 2254(d) (2024) (emphasis added). AEDPA also removed the threshold requirement that only "fairly supported" factual findings were protected by a presumption of correctness; now, every state-court factual finding can be overturned only by "clear and convincing evidence." *Compare* 28 U.S.C. § 2254(d) (1994) (amended 1996) (rejecting the presumption of correctness where the state court's "factual determination is not fairly supported by the record" as a whole), *with* 28 U.S.C. § 2254(e)(1) (2024) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

38. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 412-13 (2000) (interpreting AEDPA's "contrary to" federal law requirement); Harrington v. Richter, 562 U.S. 86, 105 (2011) (applying AEDPA to ineffective-assistance claims and describing the double-deference standard).

Stephen R. Reinhardt wrote, the story of modern habeas law is "defined by a series of highly questionable Supreme Court rulings that took a new statute, AEDPA . . . and repeatedly interpreted it in the most inflexible and unyielding manner possible."[39] At each juncture, these decisions have essentially "immunize[d]" state-court decisions from meaningful review.[40]

Despite this steady contraction of habeas, the *Witherspoon* doctrine would survive for another two decades as a safeguard against "hanging" juries. Although *Witt* relaxed the substantive standard for excusing life-leaning jurors and instructed federal habeas courts to apply a "presumption of correctness" to state trial courts' jury-bias determinations, the underlying principle was not illusory. During this interlude, the Court never clarified how AEDPA applied to *Witherspoon*, and defendants succeeded in reversing death sentences imposed by juries stacked in favor of death.[41]

Then, in 2007, came *Uttecht v. Brown*. In *Uttecht*, the Court reaffirmed *Witt* but read it through the lens of AEDPA's "additional, and binding, directions to accord deference."[42] *Uttecht* first held that, as a general matter, the Court's death-qualification precedents counsel deference to the trial court "to assess the demeanor of the venire."[43] Applying this deference to the facts, the Court then held the state trial court had reasonably found the juror was substantially impaired, despite the juror's "assurances that he would consider imposing the death penalty and would follow the law."[44] The Court reasoned that this was not a case "where the record discloses *no basis* for a finding of substantial impairment" such that a reviewing court could override the trial court's demeanor determination.[45] Why? The juror in *Uttecht* had at one point indicated he could impose death only if he were certain that the defendant would kill again. When the prosecution then explained to the juror that the only alternative sentence was life without parole, the juror eventually responded that he would vote for death if "convinced that was the appropriate measure."[46] To the *Uttecht* Court, this exchange reflected

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39. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1221 (2015).

40. *Id.* at 1230; *see also* Brandon L. Garrett & Kaitlin Phillips, *AEDPA Repeal*, 107 CORN. L. REV. 1739, 1761 (2022) (explaining how "AEDPA's restrictions create a procedural labyrinth that blocks even potentially meritorious claims").

41. *See, e.g.*, United States v. Chanthadara, 230 F.3d 1237, 1246-47 (10th Cir. 2000) (direct appeal); Szuchon v. Lehman, 273 F.3d 299, 306-07 (3d Cir. 2001) (federal habeas case).

42. Uttecht v. Brown, 551 U.S. 1, 9-10 (2007).

43. *Id.* at 9.

44. *Id.* at 18.

45. *Id.* at 20 (emphasis added).

46. *Id.* at 15.

"considerable confusion on the part of the juror," providing some "basis" for a finding of substantial impairment.[47]

In sum, the Supreme Court continued to apply AEDPA maximally. *Uttecht* did not clarify, however, the level of deference owed outside of federal habeas. *Uttecht* only noted, in an ambiguous statement, that "[c]ourts reviewing claims of *Witherspoon-Witt* error, [and] *especially* federal courts considering habeas petitions, owe deference to the trial court."[48] The Court recognized some distinction between courts hearing direct appeals and habeas petitions, but left the scope of that distinction unclear. Nowhere in *Uttecht* did the Court purport to overrule *Greene* or imply that all courts reviewing *Witherspoon* error must apply the same level of deference. Nor did the opinion clarify whether, for federal habeas courts bound by AEDPA, the new threshold for reversal is a record that discloses "no basis" for an impairment finding. Even so, the lower federal courts read *Uttecht* as breaking new ground on the habeas review of *Witherspoon-Witt* claims.[49] And, as Part II uncovers, state courts also grasped onto this ambiguity about the appropriate level of deference to cabin *Witherspoon* even in direct appeals.

Eight years later, *White v. Wheeler* answered some of the questions *Uttecht* left open by moving toward even greater deference.[50] Like *Uttecht*, *Wheeler* reversed federal habeas relief for *Witherspoon-Witt* error on the grounds that the court below had not shown sufficient deference to the trial judge. Quoting *Uttecht*, *Wheeler* reiterated that this was "not a case where 'the record discloses *no basis* for a finding of substantial impairment.'"[51] *Wheeler*, however, also expanded the scope of deference beyond what *Uttecht* contemplated. *Wheeler* pronounced that AEDPA review of *Witherspoon-Witt* claims must be "doubly deferential."[52] Under double deference, *Wheeler* held, the question is whether the juror's excusal was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[53]

The facts of *Wheeler* itself illustrate the practical effect of such a deferential standard. In *Wheeler*, the trial judge dismissed a prospective juror, Kovatch, who

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47. *Id.* at 20.

48. *Id.* at 22 (emphasis added).

49. *See id.* at 35-36 (Stevens, J., dissenting) (arguing that *Uttecht* applied a level of deference outstripping even what AEDPA already required); *see also infra* notes 78-80 and accompanying text (cataloguing how lower courts have invoked *Uttecht* to justify greater deference).

50. 577 U.S. 73, 78 (2015) (per curiam).

51. *Id.* at 80 (emphasis added) (quoting *Uttecht*, 551 U.S. at 20).

52. *Id.* at 78 (quoting Burt v. Titlow, 571 U.S. 12, 15 (2013)).

53. *Id.* at 77 (quoting White v. Woodall, 572 U.S. 415, 420 (2014)).

stated that he *could* "consider the entire range of penalties," including death.[54] However, in its for-cause challenge, the prosecution argued that Kovatch had equivocated by stating that imposing death was a "very difficult" question.[55] The trial judge preliminarily found that Kovatch was not "problematic" in light of Kovatch's express statement that he could consider death, but she took the matter under advisement.[56] The following morning, the judge—relying on an "inaccurate paraphrase of the record"[57]—concluded that Kovatch had said he could *not* consider the entire range of penalties. In reality, Kovatch had said that he did not know to an "absolute[] certain[ty]" whether he could consider death.[58] On that mistaken basis, the judge struck Kovatch from the jury. The jury eventually sentenced the defendant, Mr. Wheeler, to death.

This should have been a reversible error under *Witherspoon* and *Witt*, even under the substantial deference required on federal habeas review. And indeed, on appeal, the Sixth Circuit emphasized that AEDPA "does not protect an inconsistent ruling by the state trial judge based on a *mistaken memory*" of a juror's voir dire.[59] But the Supreme Court disagreed. Without full briefing or argument, the Court held that even an apparent memory lapse was subject to deference.[60] Reiterating language from *Uttecht*, the *Wheeler* Court reminded the Sixth Circuit that "[a] trial court's 'finding may be upheld even in the absence of clear statements from the juror that he or she is impaired.'"[61] And, the Court continued, if the judge had accurately recalled the juror's statement on voir dire, that statement would have been a "basis" for excusal.[62] To be clear, the record before the Court demonstrated the judge had *not* remembered correctly. In effect, the Court supplied a post hoc "basis" for the trial court's substantial-impairment finding, ignoring the trial judge's error.

In pronouncing "double deference," *Wheeler*—following *Uttecht*—concretized two extraordinarily high thresholds to find *Witherspoon-Witt* error on federal habeas review: (1) there must be "no basis" for the trial court's finding of

54. Wheeler v. Simpson, 779 F.3d 366, 371 (6th Cir. 2015), *rev'd per curiam sub nom.*, White v. Wheeler, 577 U.S. 73 (2015).

55. *Id.*

56. *Id.* at 372.

57. *Id.*

58. *Id.* at 371.

59. *Id.* at 379 (emphasis added).

60. White v. Wheeler, 577 U.S. 73, 80 (2015) (per curiam).

61. *Id.* at 77-78 (quoting Uttecht v. Brown, 551 U.S. 1, 7 (2007)).

62. *Id.* at 79.

substantial impairment, and (2) the error must be "beyond any possibility for fair-minded disagreement."[63]

B. Witherspoon *After* Wheeler

Dissenting in *Uttecht*, Justice Stevens wrote that the Court's approach to *Witherspoon* amounts to "defer[ring] blindly to a state court's erroneous characterization of a juror's voir dire testimony."[64] Stevens's warning proved prescient. Uncritical deference is precisely correct, because the *Witherspoon* doctrine—as a practical matter—no longer exists in federal habeas. I have identified no case where a federal habeas applicant prevailed due to *Witherspoon* error since *Wheeler* was decided in 2015.[65] Instead, federal appellate courts have uniformly reversed district courts that have granted habeas relief under *Witherspoon*.

Smith v. Davis illustrates *Uttecht* and *Wheeler*'s impact.[66] There, the Fifth Circuit reversed a district court's finding that a state trial judge did not comply with *Witherspoon*.[67] The juror in *Smith* wrote in a questionnaire that the death penalty was "good" and "should be used on the worst of crimes."[68] He also affirmed that he would consider "all of the penalties" in the given case.[69] However, during voir dire, the juror said that talk of "death bothers me a little bit" and that he had "moral[] and conscientious[]" objections to the death penalty.[70] The trial judge dismissed him for cause.[71] On federal habeas review, the district court recognized that this was precisely "the kind of juror" *Witherspoon* held must not be disqualified: one who "opposed the death penalty," yet affirmed that he could choose between life and death.[72]

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63. *Id.* at 79-80.

64. *Uttecht*, 551 U.S. at 35 (Stevens, J., dissenting) (emphasis omitted).

65. On Westlaw, I reviewed all citing references by federal courts to *Wainwright v. Witt* and *Witherspoon v. Illinois* since *Wheeler* was handed down in 2015. WESTLAW, "*White v. Wheeler*" (Aug. 15, 2025) (filtered citing references by keyword search for "*Wainwright v. Witt*" or "*Witherspoon v. Illinois*").

66. 927 F.3d 313, 323-24 (5th Cir. 2019).

67. *Id.* at 339-40.

68. *Id.* at 324.

69. *Id.* at 324-25.

70. *Id.* at 326-27.

71. *Id.* at 327.

72. *Id.* at 328 (internal quotation marks omitted) (quoting the district court's conclusion from the record on appeal).

The Fifth Circuit disagreed, holding that the district court failed to apply double deference to the trial judge's ruling.[73] Quoting *Uttecht* and *Wheeler*, the panel emphasized that reversal under AEDPA was only appropriate where (1) the record "discloses no basis" for a finding of substantial impairment and (2) the error is "beyond any possibility for fair-minded disagreement."[74] Applying these two extraordinarily deferential standards, the Fifth Circuit found no *Witherspoon* error. The trial court's inquiry into the juror's moral objections could "plausibly" be interpreted as a question about whether the juror would be unable to vote for death regardless of the facts.[75] Of course, that was not the question the trial judge had asked the prospective juror.[76] Still, the Fifth Circuit reasoned that this was a "reasonable interpretation" of the voir dire — one that supplied a "basis" for excusal and a "possibility for fairminded disagreement."[77] As the Supreme Court did in *Wheeler*, the Fifth Circuit in *Davis* inferred a post hoc "basis" to save a trial-court ruling otherwise tainted by clear error.

Other federal habeas courts have followed the same approach. Several district courts, relying on *Wheeler*, have characterized the standard for finding a *Witt* violation as whether there was "any possibility for fairminded disagreement."[78] The Ninth Circuit, invoking *Uttecht*, has implied that reversal on *Witherspoon-Witt* error is appropriate only if there is "no basis" for a finding of substantial impairment.[79] Putting these precedents together, a federal district court in Alabama accurately described the lesson of *Witt* and its progeny as requiring deference "even in situations where the challenged juror at times expressed a

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73. *See id.* at 333 ("The federal district court did not give appropriate deference to the [Texas Court of Criminal Appeals's] determination that the trial court did not violate the federal constitution when it removed Stringer for cause.").

74. *Id.* at 332-33 (first quoting Uttecht v. Brown, 551 U.S. 1, 20 (2007); and then quoting White v. Wheeler, 577 U.S. 73, 77 (2015)).

75. *Id.* at 331.

76. The question asked, "Do you have any objections — any moral, conscientious or religious objections to the imposition of the death penalty in an appropriate capital murder case?" The juror answered, "Yes." *Id.* at 327.

77. *See id.* at 330-32 (quoting White v. Woodall, 572 U.S. 415, 419-20 (2014)).

78. *See, e.g.*, Taylor v. Steele, 372 F. Supp. 3d 800, 809 (E.D. Mo. 2019) (holding that a state prisoner must show that the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" (quoting Harrington v. Richter, 562 U.S. 86, 102 (2011))), *aff'd*, 6 F.4th 796 (8th Cir. 2021); Group v. Robinson, 158 F. Supp. 3d 632, 663 (N.D. Ohio 2016) (same); Andrade v. Vidal, No. 15-13247, 2018 WL 7505769, at *7 (D. Mass. June 29, 2018) (quoting *Wheeler*, 577 U.S. at 77), *report and recommendation adopted*, No. 15-cv-13247, 2019 WL 1047172 (D. Mass. Mar. 4, 2019).

79. Gentry v. Sinclair, 705 F.3d 884, 912 (9th Cir. 2013).

willingness to impose a sentence of death."[80] This standard is difficult—if not impossible—to reconcile with *Witherspoon*'s core principle that opposition to the death penalty may not justify exclusion from the jury. Yet after *Uttecht* and *Wheeler*, trial judges may effectively do just that. As in *Smith*, trial judges may "plausibly" interpret mere opposition to the death penalty as a "basis" for substantial impairment. And then federal habeas courts may defer to such findings even where, as in *Wheeler*, a trial judge erroneously interprets the juror's statements.

Make no mistake: this standard imposes immeasurable costs. For those sentenced to death, a once-potent doctrine for preventing their executions has all but vanished in federal court. Because *Witherspoon* error is structural, it is not subject to harmless-error review; courts that find *Witherspoon* error must reverse the death sentence.[81] But, again, no habeas petitioner has overcome double deference under *Uttecht* and *Wheeler*. These very cases illustrate the impossibly high bar set for *Witherspoon* claims. In both, the state struck a life-leaning juror who affirmed they could vote for death, so the lower federal courts vacated the petitioners' death sentences.[82] But on remand from the Supreme Court, both defendants lost their habeas cases.[83] Today, Mr. Wheeler waits for execution on Kentucky's death row.[84] The petitioner in *Uttecht*, Mr. Stevens, died on death row in 2012.[85]

II. AEDPA SPILLOVER IN DIRECT APPEALS AND STATE COURTS

The Supreme Court's decision in *Greene v. Georgia* clarified that *Witt*'s original pronouncements about deference were binding authority only in federal

80. Boyle v. Dunn, No. 18-CV-1966, 2022 WL 980648, at *48 (N.D. Ala. Mar. 30, 2022).

81. Gray v. Mississippi, 481 U.S. 648, 665 (1987) ("The nature of the jury selection process defies any attempt to establish that an erroneous *Witherspoon-Witt* exclusion of a juror is harmless.").

82. Wheeler v. Simpson, 852 F.3d 509, 512 (6th Cir. 2017); Stevens v. Beard, 701 F. Supp. 2d 671, 679 (W.D. Pa. 2010).

83. *Wheeler*, 852 F.3d at 532; *Stevens*, 701 F. Supp. 2d at 740.

84. Rachel Smith, *A Serial Killer, Kidnappers, Burglars: These 25 People Are on Death Row in Kentucky*, Louisville Courier J. (July 26, 2024, 5:04 AM ET), https://www.courier-journal.com/story/news/crime/2024/07/26/who-is-on-death-row-in-kentucky/74407511007 [https://perma.cc/42CM-LT75].

85. Kristen Doerschner, *Man Convicted of Killing His Wife, Cop Dies on Death Row*, Times Online (Mar. 13, 2012, 12:15 AM), https://www.timesonline.com/story/news/crime/2012/03/13/man-convicted-killing-his-wife/18425489007 [https://perma.cc/BQ97-Q774].

habeas cases.[86] That holding—which remains good law—extends to the standards articulated in *Uttecht* and *Wheeler*. Like *Witt*, both were federal habeas cases that interpreted the federal habeas statute: § 2254(d). Both cases thus bind only federal habeas courts—not federal direct appeals or state courts. Yet federal courts reviewing direct appeals and state courts have relied on *Wheeler* and *Uttecht* to describe the standard of review for *Witherspoon* claims. As a result, a standard born out of AEDPA has spilled over into non-habeas review.

This Part outlines the pattern of deference spillover. By mimicking the Supreme Court's review of *Witherspoon* error in habeas cases, non-habeas courts have implicitly extended deference due under AEDPA to cases where AEDPA has no application. Section II.A analyzes how the First and Tenth Circuits—in *United States v. Tsarnaev*[87] and *United States v. Fields*,[88] respectively—erroneously adopted the *Uttecht*-*Wheeler* "no basis" standard on direct federal appeal. Neither circuit recognized nor justified its application of the habeas standard. Section II.B turns to the state courts that similarly adopt deferential language from *Wheeler* and *Uttecht* to resolve *Witherspoon*-*Witt* claims on direct appeal. In doing so, these appellate courts overlooked the discretion they retain to determine their own standards of review—a discretion that the Supreme Court expressly confirmed in *Greene*. If left unchecked, this spillover threatens to extinguish *Witherspoon* not only in federal habeas but in all capital appeals.

A. Deference Spillover in Direct Federal Appeals

Two circuits have now applied the "no basis" standard—first set out in *Uttecht* and reaffirmed in *Wheeler*—to review a federal trial judge's substantial-impairment finding on direct appeal.

The Tenth Circuit adopted the standard in *United States v. Fields*, holding that "[t]he excusal of a prospective juror *must be* affirmed unless 'the record discloses *no basis* for a finding of substantial impairment.'"[89] *Fields*'s articulation of the no-basis standard arguably went even further than *Uttecht*. *Uttecht* stated that a reviewing court "may reverse" where there is no basis for an impairment finding,[90] but it did not explicitly hold that courts must reverse when there is "no basis" for the finding. That the Tenth Circuit adopted such a deferential standard of

86. 519 U.S. 145, 146 (1996) (per curiam) (holding that the Georgia Supreme Court was "mistaken" in believing itself "bound by *Witt*'s standard of review of trial court findings on jury-selection questions").

87. 96 F.4th 441, 469 (1st Cir. 2024).

88. 516 F.3d 923, 937 (10th Cir. 2008).

89. *Id.* (emphasis added) (quoting Uttecht v. Brown, 551 U.S. 1, 20 (2007)).

90. *Uttecht*, 551 U.S. at 20.

review, and well before *Wheeler*, is especially striking given the facts of the case. The prospective juror in *Fields* admitted during voir dire that he would be "substantially impaired" by his moral criteria for imposing death.[91] In other words, *Fields* was arguably a clear case under *Witt*'s substantive standard, yet the Tenth Circuit still rested its opinion on "the guiding principles from *Uttecht*," applying extraordinary deference where such deference was unnecessary.[92]

Nowhere in *Fields* did the Tenth Circuit recognize that these "guiding principles" came from a habeas case reviewing a state conviction, where AEDPA's strictures governed. Nor did the court justify why an AEDPA standard should apply to a direct appeal from a federal conviction. The rationales for deference in habeas—federalism, comity, and respect for state-court decision-making—are wholly inapplicable to an appellate federal court reviewing the decision of a lower federal court.[93] By failing to identify the provenance of its standard of review, let alone justify its application to direct appeal, the Tenth Circuit appeared to err in *Fields*.

The First Circuit made the same error in *United States v. Tsarnaev*. There, too, the court applied *Uttecht* and *Wheeler*'s "no basis" standard on direct appeal.[94] Unlike *Fields*, *Tsarnaev* came after *Wheeler* and presented a closer *Witt* question. The challenged juror, a former public defender, stated that he could impose the death penalty only in an "exceedingly rare case."[95] During voir dire, the juror was "reluctan[t]" to consider hypotheticals about the cases in which he would impose death, but he gave the example of a genocide perpetrator.[96] The trial court granted the prosecution's for-cause challenge of the juror, resting its ruling on demeanor evidence. The juror's "zone of possibility" for imposing death, the trial judge said, seemed too narrow.[97]

On appeal, the First Circuit affirmed the defendant's conviction and death sentence. The panel noted that deference to the trial court is "not absolute" because an appeals court "may reverse if 'the record discloses *no basis* for a finding of substantial impairment.'"[98] And in this case, the court concluded such a basis existed: the juror's example of genocide gave the trial court reason to believe he

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91. *Fields*, 516 F.3d at 937.

92. *Id.* at 938.

93. *See* Coleman v. Thompson, 501 U.S. 722, 730 (1991) ("In the habeas context, the application of the independent and adequate state-ground doctrine is grounded in concerns of comity and federalism.").

94. United States v. Tsarnaev, 96 F.4th 441, 469 (1st Cir. 2024).

95. *Id.* at 465, 467.

96. *Id.* at 466.

97. *Id.* at 467, 469.

98. *Id.* at 469 (emphasis added) (quoting Uttecht v. Brown, 551 U.S. 1, 20 (2007)).

would vote for death only in cases akin to genocide, rather than those more similar to the case at hand.[99] While the juror never said so explicitly, the First Circuit found the inference worthy of deference.

Like the Tenth Circuit in *Fields*, the First Circuit in *Tsarnaev* relied on the Supreme Court's language in *Wheeler* and *Uttecht*. This was error. These cases offer, at most, only persuasive authority as to the appropriate standard of review. While *Witt* tells us some deference is owed to trial-court jury-bias determinations on direct appeal, the Court nowhere suggested that this deference rose to the level AEDPA requires today. A standard derived from the federal habeas statute is not the standard that courts should apply on direct appeals.

Indeed, the Second, Fifth, Sixth, Eighth, and Ninth Circuits—unlike the First and Tenth—have all recognized the distinction between habeas and direct review of *Witherspoon* error. In each of these circuits, appellate courts review for abuse of discretion—not whether there was any "basis" for exclusion.[100] Each of these circuits characterizes the applicable test slightly differently.

The Fifth, Eighth, and Ninth Circuits review *Witherspoon-Witt* claims for abuse of discretion, with no mention of *Uttecht*'s standard of review. In the Ninth Circuit, for instance, exclusions under *Witherspoon* are "no different from exclusions of jurors for any other form of bias."[101] Instead of relying on *Uttecht*'s "no basis" standard, the Ninth Circuit examines whether, consistent with *Witt*, the trial court was left with a "definite impression" that the juror would be impartial.[102] The Fifth Circuit, similarly, reviews *Witherspoon-Witt* claims for abuse of discretion.[103] Strikingly, the court also left open the possibility that "the exclusion of [a] venire member . . . based on written answers to a juror questionnaire without any voir dire" could be reviewed de novo.[104] After all, in the absence of demeanor evidence, the trial court is in no better position to evaluate juror bias than the appellate court reading the same written record.

Meanwhile, the Second and Sixth Circuits have cited *Uttecht* in direct appeals, but only for the limited and uncontroversial proposition that demeanor

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99. *Id.* at 470 ("The court did not find that Juror 355's 'zone of possibility' included only genocide—just that it did not include Tsarnaev's case. And as we have just explained, this conclusion was reasonable given the district court's observations during voir dire.").

100. *See* United States v. Fell, 531 F.3d 197, 211 (2d Cir. 2008); United States v. Sanders, 133 F.4th 341, 377 (5th Cir. 2025); United States v. Gabrion, 719 F.3d 511, 527, 534 (6th Cir. 2013); United States v. Rodriguez, 581 F.3d 775, 792 (8th Cir. 2009); United States v. Mitchell, 502 F.3d 931, 955 (9th Cir. 2007) (postdating *Uttecht*).

101. *Mitchell*, 502 F.3d at 955.

102. *Id.* (quoting Wainwright v. Witt, 469 U.S. 412, 424 (1985)).

103. *Sanders*, 133 F.4th at 377.

104. *Id.*

determinations are subject to deference.[105] Neither has transplanted the AEDPA "no-basis" standard to direct appeals. And both circuits have held that the question on direct appeal is whether, under *Witt*, the trial court's findings are "fairly supported by the record"—not whether, under *Uttecht*, there is any "basis" for excusal.[106]

B. Deference Spillover in State Courts

Greene v. Georgia confirmed that state courts may determine their own standards of review applicable to trial-court findings on death qualification.[107] Yet courts of last resort in Arizona, Missouri, and Oklahoma, have applied *Uttecht* and *Wheeler* to justify extraordinary deference.[108] By contrast, California and Tennessee have not taken that approach.[109] Those states have more mixed records of identifying *Witt* error, which suggests a less-deferential standard than Arizona, Missouri, and Oklahoma.

1. Oklahoma, Arizona, and Missouri: Near-Complete Deference

Oklahoma presents a clear example of deference spillover. In *Tryon v. State*, the Court of Criminal Appeals of Oklahoma—the state's court of last resort for criminal cases—expressly adopted a "no basis" standard for reviewing trial courts' *Witt* rulings, citing *Uttecht* as direct support. The *Tryon* court wrote: "We will reverse the lower court's ruling on a for-cause challenge where there is *no*

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105. *See Fell*, 531 F.3d at 211; *Gabrion*, 719 F.3d at 527.

106. *Gabrion*, 719 F.3d at 527 (quoting *Witt*, 469 U.S. at 434); *Fell*, 531 F.3d at 211 (same). It is worth noting that the "fairly supported" standard in *Witt* comes from the (pre-AEDPA) federal habeas statute. *See Witt*, 469 U.S. at 431 (noting that the presumption of correctness under § 2254(d) may be rebutted if the finding is not "fairly supported" by the record); *supra* text accompanying note 30. So even here, there is "deference spillover" in how the Second and Sixth Circuits have crafted their standards of review because they rely on language from the pre-AEDPA federal habeas statute. Still, that standard permits more meaningful review than one that asks whether there is any "basis" for the finding.

107. Greene v. Georgia, 519 U.S. 145, 146 (1996) (per curiam).

108. *See* State v. Naranjo, 321 P.3d 398, 404-05 (Ariz. 2014) (denying a *Witherspoon-Witt* claim and quoting *Uttecht* for the proposition that appellate courts must defer to demeanor determinations); State v. Wood, 580 S.W.3d 566, 581 (Mo. 2019) (denying a *Witherspoon-Witt* claim and quoting *Wheeler* for the proposition that the trial judge may resolve an ambiguous voir dire in the state's favor); Tryon v. State, 423 P.3d 617, 631 (Okla. Crim. App. 2018) (adopting *Uttecht*'s no-basis standard); *cf.* State v. Turnidge, 374 P.3d 853, 888-89, 893 (Or. 2016) (denying a *Witherspoon-Witt claim* and citing *Wheeler* but not expressly adopting its reasoning).

109. *See, e.g.*, State v. Miller, 638 S.W.3d 136, 150 (Tenn. 2021); People v. Mataele, 513 P.3d 190, 212 (Cal. 2022); People v. Peterson, 472 P.3d 382, 404 (Cal. 2020).

support for it in the record."[110] Where the juror's responses are ambiguous, the court continued, the trial court's ruling must stand. To be sure, *Tryon* involved a different type of death-qualification challenge: the appellant argued that the trial court improperly seated jurors who were biased in favor of imposing death. But the broader point still stands. Oklahoma courts adopted an extraordinarily deferential "no support" standard for reviewing death-qualification challenges, explicitly rooted in *Uttecht*.[111] Yet *Uttecht*'s holding was premised on AEDPA's "additional, and binding, directions to accord deference"[112]—a fact that the Oklahoma court did not recognize. The consequence of such spillover is clear: the Oklahoma Court of Criminal Appeals has not reversed a death sentence (or affirmed a reversal) based on *Witherspoon* error since *Uttecht*.[113]

Arizona and Missouri, unlike Oklahoma, have not adopted a "no basis" standard of review. Yet high-court cases in each state have used *Uttecht* or *Wheeler* to justify increased deference to lower-court rulings on substantial impairment. Arizona presents a particularly troubling example. In *State v. Naranjo*, the Arizona Supreme Court refused to find *Witt* error when a trial judge excused a juror who affirmed that she could "listen to both sides fairly and impartially" but, according to the trial judge, was "very, very emotional."[114] The trial judge's ruling rested on this perception of the juror as "very emotional" but did not explain why this would have "substantially impaired her ability to serve on the jury" when the juror had twice stated that she could be fair and impartial.[115] Nevertheless, the Arizona Supreme Court affirmed the conviction and sentence, citing *Uttecht* for the proposition that the court defers to trial judges who view a witness's demeanor.[116] Like Oklahoma's courts, the Arizona Supreme Court has not reversed a death sentence (nor affirmed a reversal) based on *Witherspoon* error since *Uttecht*.[117]

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110. *Tryon*, 423 P.3d at 631 (emphasis added) (citing Uttecht v. Brown, 551 U.S. 1, 20 (2007)).

111. *Id.* (citing *Uttecht*, 551 U.S. at 20) (adopting the no-basis standard).

112. *Uttecht*, 551 U.S. at 10.

113. *See, e.g.*, Posey v. State, 548 P.3d 1245, 1264-65 (Okla. Crim. App. 2024) (denying a *Witherspoon-Witt* claim and citing *Uttecht* for the applicable standard of review); Nolen v. State, 485 P.3d 829, 853 (Okla. Crim. App. 2021) (same); Brown v. State, 422 P.3d 155, 172-74 (Okla. Crim. App. 2018) (denying a *Witherspoon-Witt* claim but reversing a death sentence on other grounds).

114. 321 P.3d 398, 405 (Ariz. 2014).

115. *Id.*

116. *Id.* at 404 ("Trial judges are in the best position to 'assess the demeanor of the venire, and of the individuals who compose it.'" (quoting *Uttecht*, 551 U.S. at 9, 20)).

117. *See, e.g.*, State v. Boyston, 298 P.3d 887, 896 (Ariz. 2013) (denying a *Witherspoon-Witt* claim and citing *Uttecht*).

Missouri has taken a similar approach. The Missouri Supreme Court has adopted a deferential standard that, following *Uttecht*, upholds trial rulings even where the judge has not "engaged in a specific analysis regarding the substantial impairment" or where the record lacks "clear statements from the juror that he or she is impaired."[118] And like the Arizona Supreme Court, the Missouri Supreme Court will overlook "even a juror's assurance that he or she can follow the law and consider the death penalty" if there are other "reasonable inferences" that the trial judge made about impairment.[119] To justify this standard, the court cited only *Uttecht*. The Missouri Supreme Court has not reversed a death sentence (or affirmed a reversal) based on *Witherspoon* error since *Uttecht*.[120]

2. Tennessee and California: Less Deference

There is another path. Apex courts in at least two states, Tennessee and California, have recognized that *Uttecht* and *Wheeler* arose on federal habeas review and treated the cases as nonbinding on their direct review. These courts review *Witherspoon* error for abuse of discretion, an already deferential standard. Still, they have declined to adopt *double* deference and the "no basis" threshold introduced by *Uttecht* and *Wheeler*. This distinction has meant the difference between life and death for the defendants in these states who have received relief.

First, consider Tennessee. In *State v. Miller*, the Tennessee Supreme Court adopted *Witt*'s and *Uttecht*'s deference to demeanor determinations but explicitly recognized that these precedents are only persuasive authority.[121] The *Miller* court acknowledged that *Witt* and *Uttecht* arose from the "presumption of correctness under the federal habeas corpus statute."[122] Though it looked to a habeas standard, the Tennessee Supreme Court's formulation appears less deferential than the "no basis" test. Rather than adopting *Uttecht* whole cloth, *Miller* explains that a Tennessee court may abuse its discretion in excusing a juror by "reaching an illogical or unreasonable decision" or "basing its decision on a clearly erroneous assessment of the evidence."[123] This standard is more searching than a "no basis" standard that would overlook, as in *Wheeler*, a trial judge's erroneous recollection of voir dire. And, unlike the states above, the Tennessee

118. State v. Deck, 303 S.W.3d 527, 535 (Mo. 2010) (quoting *Uttecht*, 551 U.S. at 7).

119. *Id.* at 535-36 (citing *Uttecht*, 551 U.S. at 18).

120. *See, e.g.*, State v. McFadden, 369 S.W.3d 727, 738 (Mo. 2012) (denying a *Witherspoon-Witt* claim and citing *Uttecht*).

121. 638 S.W.3d 136, 150 (Tenn. 2021).

122. *Id.* at 150; *see also id.* at 150 n.10 (acknowledging that *Uttecht* also arises in the federal habeas corpus context).

123. *Id.* at 151 (quoting Lee Med., Inc. v. Beecher, 312 S.W.3d 515, 524 (Tenn. 2010)).

Supreme Court has reversed a death sentence because of *Witherspoon* error after *Uttecht*. In *State v. Sexton*, the court reversed a death sentence because a trial judge excluded jurors based solely on written responses about their opinions on the death penalty, without voir dire or consideration of all of the jurors' questionnaire answers.[124]

California has also declined to embrace *Uttecht*'s extraordinary deference—and it has gone a step further. While Tennessee allows for some scrutiny, California's less-deferential approach allows for more searching review of trial-court determinations under *Witherspoon*. First, California courts distinguish between trial rulings resting on demeanor evidence and those that do not. Only the former commands deference. If the juror's exclusion was based on voir dire and the juror provides conflicting answers, the trial judge's findings bind the appellate court if supported by "substantial evidence."[125] If dismissal instead rested solely on written questionnaire answers, the appellate court reviews the record de novo.[126] On de novo review, excusal may be upheld only if the juror's answers "*clearly demonstrate* the juror's unwillingness or inability" to perform her duties.[127]

This more searching standard has materially affected case outcomes: the California Supreme Court has overturned several death sentences where the written questionnaire did not "clearly" reveal an inability to perform the juror's duties.[128] In *People v. Zaragoza*, for instance, the court found that a trial judge erred in excusing a juror who wrote that, due to her religious convictions, she did not "feel [she had] the right to decide if a person is to die."[129] The juror also affirmed in her questionnaire that she could "set aside" her personal feelings and follow the law.[130] The California court held that *Witherspoon* barred this juror's removal, because her written responses did not "clearly establish" that she should be disqualified.[131] This stands in stark contrast to *Smith v. Davis* and *State v. Naranjo*,

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124. 368 S.W.3d 371, 395 (Tenn. 2012).

125. People v. Mataele, 513 P.3d 190, 212 (Cal. 2022). As a technical matter, California courts review jury-bias findings for abuse of discretion. But the California Supreme Court has clarified that a court can abuse its discretion "by making a ruling unsupported by substantial evidence." People v. Armstrong, 433 P.3d 987, 1007 (Cal. 2019). So, in practice, the controlling question is whether substantial evidence supported the *Witherspoon* determination. *See id.*

126. People v. Peterson, 472 P.3d 382, 404 (Cal. 2020) (citing People v. Woodruff, 421 P.3d 588, 624 (Cal. 2018)).

127. *Id.* at 401 (emphasis added).

128. People v. Zaragoza, 374 P.3d 344, 358, 360, 362 (Cal. 2016) (reversing a death sentence based on *Witherspoon-Witt* error); *see also Peterson*, 472 P.3d at 404 (same).

129. *Zaragoza*, 374 P.3d at 358.

130. *Id.*

131. *Id.* at 360.

where the Fifth Circuit and the Arizona Supreme Court, respectively, upheld the excusal of life-leaning jurors who had otherwise affirmed their ability to follow the law.[132]

Second, even under the "substantial-evidence" standard for reviewing ambiguous voir dire exchanges, the California Supreme Court has scrutinized the trial judge's rationale more closely than other courts. In *People v. Pearson*, the trial judge excused a juror because of what the judge described as "equivocal" answers on whether she opposed the death penalty.[133] In particular, the judge reasoned that because the juror had no strong views, she would not "stand behind" the penalty.[134] But as the California Supreme Court highlighted, that was an "erroneous view" of *Witherspoon* and *Witt*.[135] If "[p]ersonal opposition to the death penalty is not itself disqualifying" under *Witherspoon*, a fortiori, the absence of definite views on the death penalty cannot be disqualifying.[136] The trial judge's finding that the juror was disqualified was therefore "not supported by substantial evidence," and the court reversed the death sentence.[137] Compare this outcome with *Uttecht*, where the juror affirmed his ability to impose death but showed some "confusion" about the scenarios in which he supported the death penalty.[138] There, the U.S. Supreme Court reinstated the death sentence; in *Pearson*, the California Supreme Court reversed.

This standard of review has meant that, in California, *Witherspoon* remains a robust protection against death-stacked juries. Courts regularly reverse death sentences based on *Witherspoon* error. In *People v. Armstrong*, for instance, the California Supreme Court reversed a death sentence where prosecutors constructed murder hypotheticals designed to exclude jurors who were competent to serve, but had doubts about death at different levels of culpability.[139] Responding to these hypotheticals, one juror "expressed uncertainty as to how he would vote" under certain aggravating and mitigating circumstances.[140] This was not enough to justify excusal.[141] Finding similar errors throughout the record, the court held that the trial court below improperly excused four jurors.[142]

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132. *See supra* text accompanying notes 66-77, 114-116.

133. 266 P.3d 966, 984-85 (Cal. 2012).

134. *Id.*

135. *Id.* at 985.

136. *Id.*

137. *Id.*

138. Uttecht v. Brown, 551 U.S. 1, 20 (2007).

139. 433 P.3d 987, 1007, 1037 (Cal. 2019).

140. *Id.*

141. *Id.*

142. *Id.* at 1003.

Other examples in California abound.[143] The volume of reversals is a sobering reminder of what more-deferential standards require appellate courts to overlook: constitutional violations.

III. RESTORING *WITHERSPOON*

Witherspoon sought to prevent death sentences by a "hanging jury." But a standard for reviewing *Witherspoon* claims that merely defers to the trial judge's ruling—so long as there is any colorable basis for finding a juror impaired—is no bar on a "hanging jury" at all. That is the standard that most courts apply today, one that has spread from the AEDPA context to become the de facto rule for any court reviewing *Witherspoon* error.

Still, *Witherspoon*'s end is not inevitable. The spillover of AEDPA deference is neither complete nor permanent. While *Wheeler* has settled that federal habeas courts must obey a rule of near-complete deference, the Supreme Court's admonition that the federal habeas statute "does not govern the standard of review" in state courts remains good law.[144] State courts are free to develop their own standards for reviewing lower-court error. Nor do *Wheeler* and *Uttecht* require double deference in direct federal appeals. As a result, capital-defense attorneys still have paths forward: by urging both federal courts on direct appeal and state courts to reject habeas-specific standards, they can work to restore *Witherspoon*'s core protections.

A. Federal Courts

In the federal courts, advocates should argue that, because *Uttecht* and *Wheeler* interpreted AEDPA, the two rulings do not bind federal courts on direct appeal (where AEDPA is irrelevant). In an appropriate case, the First and Tenth Circuits should be asked to reconsider their error in applying *Uttecht* and *Wheeler* without recognizing the origins of that standard or justifying its application to

143. *See, e.g.*, People v. Covarrubias, 378 P.3d 615, 639 (Cal. 2016) (reversing a death sentence for *Witherspoon* error); People v. Buenrostro, 430 P.3d 1179, 1216 (Cal. 2018) (same); People v. Riccardi, 281 P.3d 1, 24 (Cal. 2012) (reaching the same conclusion when a juror had "inconsistent answers" on a written questionnaire); People v. Leon, 352 P.3d 289, 307 (Cal. 2015) (reaching the same conclusion and holding that the court conducted an insufficient oral voir dire to rehabilitate jurors).

144. Greene v. Georgia, 519 U.S. 145, 146 (1996) (per curiam).

direct appeals. With the Trump Administration's renewed pursuit of the death penalty at the federal level, the need to correct the law is even more urgent.[145]

Outside of the First and Tenth Circuits, advocates should argue that de novo review applies to trial-court exclusions based solely on written questionnaires. This argument was raised recently in the Fifth Circuit.[146] As defense counsel in that case argued, the rationale for abuse-of-discretion review does not apply when a ruling is based solely on a written questionnaire, because the trial judge is not relying on demeanor evidence.[147] The Fifth Circuit ultimately sidestepped this question (holding that the juror was excludable under de novo or abuse-of-discretion review).[148] But this argument prevailed in the Tenth Circuit before *Uttecht* and *Wheeler*, where the decision to remove a juror based on her written responses alone was reviewed de novo.[149] Defense attorneys should continue to raise the issue in the *Witherspoon* context, noting that the deference accorded in *Witt* was premised on a "trial judge who sees and hears the juror."[150] Where the trial judge is reading only a written record, no deference is warranted.

B. State Courts

In state court, capital defenders should, citing the Supreme Court's decision in *Greene*, push courts to adopt less-deferential standards for reviewing *Witherspoon* error. To give substantial effect to *Witherspoon*'s protections, state courts should follow California's example. California courts give due deference to trial-court determinations of demeanor, but they also impose requirements to ensure that even deferential review is meaningful and substantive.[151] In particular, California's approach has two key features that capital defenders could draw upon.

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145. *See* Aaron Pellish, *Trump Says He Will Direct Justice Department to 'Vigorously Pursue the Death Penalty*,' CNN (Dec. 24, 2024, 1:13 PM EST), https://www.cnn.com/2024/12/24/politics/trump-death-penalty [https://perma.cc/8QQP-GGRA].

146. United States v. Sanders, 133 F.4th 341, 376-77 (5th Cir. 2025).

147. Appellant's Reply Brief at 94, *Sanders*, 133 F.4th 341 (No. 15-31114) ("When a district judge excuses a juror without the benefit of in-person examination, there are no determinations of demeanor and credibility to which to defer. Under these circumstances, the appellate court suffers no disadvantage compared to the district court.").

148. *Sanders*, 133 F.4th at 377.

149. United States v. Chanthadara, 230 F.3d 1237, 1270 (10th Cir. 2000). Because *Uttecht* and *Wheeler* were habeas cases interpreting AEDPA, they should not alter the holding that the *Chanthadara* court reached on direct appeal. Nor did *Fields* undermine *Chanthadara*; in *Fields*, the trial judge conducted oral voir dire. United States v. Quinones, 511 F.3d 289, 302-04 (2d Cir. 2007); United States v. Purkey, 428 F.3d 738, 750 (8th Cir. 2005).

150. Wainwright v. Witt, 469 U.S. 412, 426 (1985).

151. *See supra* text accompanying notes 125-131.

First, California requires the record to make "manifest" a juror's impairment with "sufficient clarity [such] that a reviewing court can identify a basis for the trial court's conclusion."[152] Such a standard recognizes that any mere "basis" for the trial court's finding (including a post hoc basis gleaned on appeal) is insufficient to affirm. This standard comports with the common-sense understanding that death is different, and an erroneous death sentence may not be walked back.[153] Where the record is sparse—for instance, because a trial judge failed to question a conflicted juror—ambiguities should be resolved in favor of life. California's approach allows for just such a safeguard. When a prospective juror's position is unclear and the trial judge fails to question that juror on whether they could follow their oaths, the remedy is a new penalty-phase trial.[154] And where a trial judge decides a juror's excusal based on a written questionnaire alone—without the benefit of demeanor evidence—then the appellate courts review de novo, and reverse excusals based on ambiguous responses.[155]

Second, California's substantive review of *Witherspoon* errors is more rigorous, by deferring only to jury-bias determinations supported by "substantial evidence." Such an approach avoids groundless outcomes like *Wheeler*, where the trial judge's mistaken recollection is justified on appeal with a post hoc basis for excusal. *Armstrong* recognized that uncertain responses to leading hypotheticals do not supply "substantial evidence" of a juror's substantial impairment. Instead, the court should be left with the "definite impression" that a juror cannot faithfully apply the law.[156] The appellate court must reverse if the record does not substantially support such a conclusion.

Even if states do not adopt California's standard, a more moderate approach is still preferable to *Uttecht* and *Wheeler*. Tennessee's standard, which allows reversals for a trial judge's "clearly erroneous" assessment of voir dire testimony, still appears to provide some protection against the "hanging jury." That standard would at least allow for reversal where the trial judge misreads the record.

Adopting a less-deferential standard also has a systemic benefit: higher courts may develop guidance for trial courts applying *Witherspoon* in the first instance. As Giovanna Shay and Christopher Lasch have argued, deference regimes like AEDPA have hindered the development of law by permitting appellate

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152. People v. Peterson, 472 P.3d 382, 405 (Cal. 2020).

153. Indeed, the Supreme Court has repeatedly recognized as much. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 188 (1976) (recognizing that the "penalty of death is different in kind from any other punishment imposed under our system of criminal justice"); Ring v. Arizona, 536 U.S. 584, 605-06 (2002) ("[T]here is no doubt that 'death is different.'").

154. People v. Leon, 352 P.3d 289, 307 (Cal. 2015) (noting that trial judges must use oral voir dire to resolve ambiguities in a prospective juror's death qualification).

155. *Peterson*, 472 P.3d at 404.

156. People v. Armstrong, 433 P.3d 987, 1003 (Cal. 2019).

courts to render rulings that turn solely on deference,[157] rather than substantive issues like whether there was a *Witherspoon* error at all. This is especially consequential given that the U.S. Supreme Court has not offered trial courts any substantive guidance on applying *Witherspoon* and *Witt* since 1987.[158] Without such guidance, the bounds of a *Witherspoon*-excludable juror in trials—both federal and state—rest on case-by-case judgment calls. California's less-deferential regime once again illustrates a better path. In California, courts have reached the substance of *Witherspoon* challenges and, in the process, developed a far more fulsome body of law on which trial courts can rely. To reduce the arbitrary and inconsistent application of *Witherspoon*, other states should follow.

CONCLUSION

Meaningful substantive review ensures that *Witherspoon*'s core principle is not lost to deference: a juror who will follow their oath and instructions may not be disqualified merely for opposing the death penalty. This principle is anything but abstract. Life-leaning jurors may change the outcome of death-penalty cases. If recent research is any indication, as many as thirty percent of prospective jurors could be excluded for their positions on the death penalty.[159] That is not a surprise. Many Americans reject what is being done in their name on the other side of the execution curtain. Many may be reluctant to bear the decision of imposing death. For its part, the state "may well be reluctant to pull back the curtain for fear of how the rest of us might react to what we see."[160] But perhaps it is those who fear the weight of imposing death who best understand the gravity of their task. So, in the end, *Witherspoon* comes down to this: but for that conflicted juror, a person may die who could have lived.

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157. Shay & Lasch, *supra* note 7, at 228-30.

158. *See* Gray v. Mississippi, 481 U.S. 648, 658 (1987).

159. Garrett et al., *supra* note 14, at 426 (surveying 480 jurors and finding that thirty-two percent of jurors "would automatically refuse to consider a death sentence").

160. Glossip v. Gross, 576 U.S. 863, 977 (2015) (Sotomayor, J., dissenting).