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tal in nature, such as severe emotional trauma or nervousness.[29] In *Dillon* the injury seems to have been primarily emotional in character, although the extent of any "physical" side effects is not ascertainable from the court's opinion.[30] Apparently the California court has construed the term "physical injury" to allow recovery for symptoms which most jurisdictions would term emotional.

IV. Conclusion

The California supreme court has not completely abandoned the zone of danger concept, but has enlarged it to incorporate foreseeability of mental as well as physical injury. It is significant to note that the court expressly limited the application of its guidelines to the specific facts of *Dillon*. The majority refused to speculate on the implications of its holding, asserting that future recovery must be on a case-by-case basis. Although the guidelines are vague, it is difficult to imagine any guidelines that would not fall victim to this criticism. The extent to which the *Dillon* doctrine is applied will depend upon the degree of foreseeability the courts are willing to attribute to the defendant in each specific instance. Since California has been more liberal than most jurisdictions[31] in compensating mental suffering, it may be concluded that *Dillon* will be followed elsewhere only as courts become more willing to expand recovery for mental injuries.[32]

Diane Poe

Pittman v. State: The Death Penalty and Texas Jurors

The Texas Code of Criminal Procedure provides that in any capital case in which the state is seeking the death penalty, challenges to jurors are either peremptory or for cause.[1] Both the state and the defense are allowed fifteen peremptory challenges[2] which may be used without giving

[29] "The nerves, and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect through some action upon the mind." Sloane v. Southern Cal. Ry., 111 Cal. 668, 44 P. 320, 322 (1896). *See also* Easton v. United Trade School Contracting Co., 173 Cal. 199, 159 P. 597 (1916); Emden v. Vitz, 88 Cal. App. 313, 198 P.2d 696 (1948).

[30] It was not necessary for the trial court to consider the physical effects because it ruled the mother was outside the zone of danger and so granted a summary judgment against her.

[31] *See* language of State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952). *See also* definition of physical injury, note 29 *supra*.

[32] Texas courts have stood firm in denying the existence of mental suffering as a separate tort. Even should recovery be broadened, Texas would continue to speak of recovery for mental suffering only in terms of an intentional tort. *See* Fisher v. Carrousel Motor Hotel, Inc., 414 S.W.2d 774 (Tex. Civ. App. 1967), *noted in* 22 Sw. L.J. 669 (1968).

[1] Tex. Code Crim. Proc. Ann. art. 35.13 (1965).

[2] *Id.* art. 35.15 (1965). The trial court may grant additional peremptory challenges at its discretion. Enriquez v. State, 429 S.W.2d 141, 145 (Tex. Crim. App. 1968).

any reason for excluding the prospective jurors.[3] While there is no limit to the number of challenges for cause which can be exercised by either party, such challenges must be supported by facts that render the juror incapable or unfit to serve on the jury.[4] One circumstance in which a juror can be challenged for cause by the state is "that the juror has conscientious scruples in regard to the infliction of the punishment of death for crime, . . . where the state is seeking the death penalty."[5]

Recently, in *Witherspoon v. Illinois*,[6] the United States Supreme Court considered the question of whether the exclusion of prospective jurors by a challenge for cause on the basis of conscientious scruples against the death penalty is consistent with the requirements of the sixth and fourteenth amendments. The Court held that due process forbids the carrying out of a death sentence if jurors were excluded from the jury which imposed or recommended the sentence simply because they voiced general objections to or expressed conscientious scruples against capital punishment.[7] Under the *Witherspoon* standard a prospective juror can be excluded for his opposition to the death penalty only when such opposition is expressed in an unambiguous declaration that the juror is irrevocably committed to an automatic vote against capital punishment regardless of the facts that might emerge at trial.

Shortly after *Witherspoon*, the Texas court of criminal appeals decided *Pittman v. State*.[8] The *Pittman* court was confronted with determining whether the Texas practice of challenging for cause jurors who express conscientious scruples against the death penalty meets the *Witherspoon* standard.

I. WITHERSPOON V. ILLINOIS

Witherspoon was convicted of murder in 1960 in Cook County, Illinois, and the jury fixed the punishment at death. At the time the *Witherspoon* jury was impaneled, an Illinois statute provided that prospective jurors could be challenged for cause if they expressed conscientious scruples against or opposition to the death penalty.[9] During *voir dire* examination, forty-seven jurors were excluded under the authority of this statute. Only five of those excluded stated that they could never vote for the death penalty. The Illinois supreme court affirmed the conviction and sentence of death.[10] The United States Supreme Court reversed the Illi-

[3] TEX. CODE CRIM. PROC. ANN. art. 35.14 (1965).

[4] *Id.* art. 35.16(a).

[5] *Id.* art. 35.16(b)1.

[6] 391 U.S. 510 (1968).

[7] In limiting the decision to the issue of punishment the Court left open the possibility that in some future case a defendant might be able to show that such a jury is not only more prone to impose the death penalty but is also more prone to convict. *Id.* at 520 n.18.

[8] 434 S.W.2d 352 (Tex. Crim. App. 1968).

[9] "In trials for murder it shall be cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." ILL. REV. STAT. ch. 38, § 743 (1959). This statute was not enacted in the 1963 revision of the Illinois Code of Criminal Procedure, but the Illinois Supreme Court has held that § 115-4(d) incorporates former § 743. People v. Hobbs, 35 Ill. 2d 263, 274, 220 N.E.2d 469, 475 (1966).

[10] 36 Ill. 2d 471, 224 N.E.2d 259 (1967).

nois court on the issue of punishment.[11] The Court held that the challenge for cause of prospective jurors who voiced only general opposition to the death penalty violated the constitutional right of the accused to a fair and impartial jury.[12] In arriving at this decision the Court reasoned that a man who personally opposes capital punishment, no less than one who favors it, can subordinate his personal views to his duty as a juror.

Witherspoon appears to formulate definite standards which state courts must apply in future *voir dire* examinations where the state is seeking the death penalty. The dissenting opinion of Justice Black points out that "if we are to take the [majority] opinion literally"[13] the state will be required to cease asking the juror whether or not he has conscientious scruples against capital punishment. Instead, the inquiry would be whether the juror would automatically vote against capital punishment without regard to the evidence that might emerge at trial. However, since the *Witherspoon* opinion is quite ambiguous,[14] only speculation can be offered as to its application in future cases by the Supreme Court.[15] The decision certainly does not affect the right of the state to exclude potential jurors who would automatically vote against the death penalty in all cases or whose attitude toward the death penalty would prevent them from making an impartial decision as to the guilt or innocence of the accused.

II. Pittman v. State

During the process of impaneling a jury in the murder trial of Pittman, at which the state was seeking the death penalty, one hundred and twenty-six prospective jurors were examined. Of these, forty-two were challenged for cause because they expressed some degree of opposition to capital punishment. At the trial Pittman was found guilty and the jury assessed the death penalty. On appeal to the Texas court of criminal appeals, attorneys for Pittman, relying on *Witherspoon*, argued that the exclusion under a challenge for cause of all veniremen who expressed any opposition to the death penalty denied Pittman his constitutional right to a fair and impartial jury and was a denial of due process of law.[16]

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[11] *See* note 7 *supra*.

[12] 389 U.S. 1035 (1968).

[13] 391 U.S. at 538.

[14] *See* dissenting opinion of Mr. Justice Black in which he discusses the ambiguity of the majority opinion. *Id.*

[15] What effect would *Witherspoon* have in a case where a death penalty had been imposed by a jury from which some jurors whose answers made it doubtful that they would ever vote for capital punishment were challenged for cause, while others who expressed mere opposition to the death penalty were included in the jury? If the "literal meaning" of the majority opinion is applied such a case would be reversed as Justice Black points out in his dissenting opinion. A better solution would be to give equal consideration to both the beliefs of the final jury panel and to those who were excluded from the jury. A consideration of the beliefs of the final panel is equally valid as that of the potential jurors who were challenged for cause. If the final jury is composed of a cross-section of the conscience of the community, the exclusion of a few persons whose answers made it doubtful that they could ever vote for the death penalty should not result in a reversal. The discretion of the trial judge in excluding such doubtful jurors should be upheld, so long as those with simple conscientious scruples or mere opposition to the death penalty are not excluded by a challenge for cause.

[16] *See* Brief for Appellant at 2-4, 20-122, Pittman v. State, 434 S.W.2d 352 (Tex. Crim. App. 1968), for a discussion of thirteen other points of error raised on appeal.

In affirming the conviction and death sentence,[17] the Texas court distinguished the present case from *Witherspoon*. The court reasoned that, unlike *Witherspoon*, there was no effort made to exclude all "conscientious objectors" without first determining if their scruples would compel them to vote against the death penalty regardless of the facts that might emerge at trial. In support of this assertion, the court stated that its study of the *voir dire* examination revealed that thirty-eight[18] of the forty-two prospective jurors who were challenged for cause stated that they would not vote for the death penalty in any case.[19] While the court viewed the answers of three of the remaining four jurors as less than ideally unambiguous as to whether they would always vote against the death penalty, their exclusion was sustained. Justification for this action was found in the traditional Texas practice of recognizing the discretion of the trial judge in sustaining a challenge for cause where the juror's view of capital punishment makes it doubtful that he would vote for infliction of the death penalty. In ruling that the state did not cross the "line of neutrality"[20] by impaneling a jury which would be unable to render an impartial decision on the issue of punishment, the court viewed the impact of *Witherspoon* on Texas practice as minimal.

Although the exact meaning of "conscientious scruples" is ambiguous, two things are relatively clear with regard to the Texas practice of excluding potential jurors with such "scruples" against capital punishment. As indicated by *Pittman*, the traditional Texas practice is to inquire

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[17] Pittman v. State, 434 S.W.2d 352, 356 (Tex. Crim. App. 1968).

[18] This number does not include one prospective juror who was challenged for cause after having stated that she knew a husband and wife, for whose murder Pittman was also under indictment.

[19] Pittman's attorneys assert that twenty-three jurors were challenged on less than *Witherspoon* standards. Brief of Amicus Curiae at Appendix, Pittman v. State, 434 S.W.2d 352 (Tex. Crim. App. 1968), sets the number at sixteen. A study of the *voir dire* record by the author of this note reveals that three jurors [numbers (19), (29) and (90)] were challenged for cause on the basis of simple opposition or conscientious scruples to capital punishment. Seven other prospective jurors were challenged on the basis of answers which left doubt as to whether or not they could vote for the extreme penalty. The examination of juror number (19) is typical of those who were excluded on the basis of less than *Witherspoon* standards. Juror (19) was asked, "[D]o you feel that you could vote for the death penalty or do you feel that you would have conscientious scruples against the giving of the death penalty . . . ?" Answer — "I don't believe in the death penalty." Question — "You don't believe in the death penalty?" Answer — "I don't think so." After having been challenged for cause by the state, Juror (19) was questioned by Pittman's attorney who asked, "Could you imagine of any case so heinous . . . that you could vote for the death penalty if you were taken as a juror?" Answer — "Well, I said I didn't believe in it but I might be convinced on it . . . ." Question — "If the evidence were strong enough to satisfy you . . . could you vote for the death penalty?" Answer — "Well, I really, I probably would be, I probably would after not believing in it." The answers of Juror (19) reveal that while she personally opposed capital punishment, she could nevertheless "subordinate her personal views to her duty as a juror." Record at 401-02, Pittman v. State, 434 S.W.2d 352 (Tex. Crim. App. 1968).

[20] The court emphasized that the present Code of Criminal Procedure contains ample safeguards to protect the accused. First, the defendant must be given fifteen days written notice prior to the trial if the state intends to seek the death penalty. TEX. CODE CRIM. PROC. ANN. art. 1.14 (1965). After such notice is given, the defendant may enter a plea of guilty before the court, waive trial by jury, and under no circumstances can the death penalty be imposed. It should be noted that the United States Supreme Court recently held a similar provision of the Federal Kidnapping Act unconstitutional. United States v. Jackson, 390 U.S. 570 (1968). The Court reasoned that the provision of a statute which permits imposition of the death penalty only upon defendants who assert their right to a jury trial, violates the Fifth and Sixth Amendments by needlessly discouraging a defendant from exercising his right to plead innocent and demand a jury trial. Following the Supreme Court's decision in *Jackson*, the South Carolina Supreme Court held a statute similar to that in Texas to be unconstitutional. State v. Harper, 162 S.E.2d 712 (S.C. 1968).

whether these "scruples" would cause the juror to vote against the extreme penalty in every case, regardless of the facts and circumstances that might emerge at trial.[21] If this is answered in the affirmative, the juror is properly challenged for cause and excluded from the jury. However, where the juror's answers leave some doubt as to whether he would always vote against the death penalty, the challenge for cause also may be sustained within the discretion of the trial judge.[22] In *Pittman* the court of criminal appeals concluded that the latter practice did not violate the *Witherspoon* standard.

III. Conclusion

It appears that the effect of *Witherspoon* on Texas practice will be more significant than the court admits. The practice of excluding under a challenge for cause jurors whose answers make it doubtful as to whether they would vote to inflict the death penalty seemingly does not meet the *Witherspoon* standards of "unambiguous statement,"[23] "irrevocable commitment,"[24] and "automatic vote."[25]

To put the effect of *Witherspoon* on Texas practice into perspective the following conclusions are relevant:

(1) The state must attempt to ascertain whether the prospective juror would invariably vote against the infliction of the death penalty.

(2) If a prospective juror states that he could never vote for capital punishment in any case under any circumstances, he can be challenged for cause and excluded from the jury.

(3) A jury selected by challenging for cause all veniremen whose answers reveal that they are less than automatically committed to vote against capital punishment does not meet the requirements of due process.

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[21] While no cases were found on point, this practice seems to be a logical result of the procedure used in the *voir dire* examination in capital cases in Texas. The prospective juror is questioned first by the state and then passed to the defense. If the state challenges a juror prematurely, the defense may be able to qualify the juror on further examination. In that event the state would be forced to exercise a peremptory challenge or accept a juror who may be offended by the premature challenge for cause by the state.

[22] Conscientious scruples regarding the death penalty in a capital case have always been viewed as a sufficient basis on which to sustain a challenge for cause in Texas. Luton v. State, 171 Tex. Crim. 441, 350 S.W.2d 852 (1961); Burrell v. State, 18 Tex. 713 (1857). In 1856 the Texas Supreme Court sustained such a challenge based on simple conscientious scruples to the death penalty holding that "no man should be placed in a position where he is required to do violence to his conscience." White v. State, 16 Tex. 207, 218 (1856). In reasoning that a juror in such a position is likely to regard his own conscience of higher obligation than his duty as a juror, the court handed down the guidelines which have been followed in sustaining a challenge for cause based on simple objection or conscientious scruples to the infliction of the death penalty. Enriques v. State, 429 S.W.2d 141, 145 (Tex. Crim. App. 1968); Ellison v. State, 419 S.W.2d 849, 851 (Tex. Crim. App. 1967) (in which the Texas Court of Criminal Appeals upheld the validity of Tex. Code Crim. Proc. Ann. art. 35.15(b), § 1 (1965)); Crain v. State, 394 S.W.2d 165 (Tex. Crim. App. 1964); Luton v. State, 171 Tex. Crim. 441, 350 S.W.2d 853 (1961); Brewer v. State, 145 Tex. Crim. 331, 167 S.W.2d 747 (1942); Anderson v. State, 129 Tex. Crim. 586, 90 S.W.2d 564 (1936); Vickers v. State, 92 Tex. Crim. 182, 242 S.W. 1032 (1922); Myers v. State, 77 Tex. Crim. 239, 177 S.W. 1167 (1915); Johnson v. State, 44 Tex. Crim. 332, 71 S.W. 25 (1902); Sawyer v. State, 39 Tex. Crim. 557, 47 S.W. 650 (1898); Burrell v. State, 18 Tex. 713 (1857).

[23] 391 U.S. at 515-16 n.9.

[24] *Id.* at 522-23 n.21.

[25] *Id.*