

Docket No. **06-2882**

In the
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

DONALD FELL,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Petition for Rehearing and Rehearing En Banc of Defendant-Appellant

Copies to:

WILLIAM B. DARROW
PAUL J. VAN de GRAAF
Assistant United States Attorneys
P.O. Box 570
Burlington, VT 04502-0570
(802) 951-6725

Respectfully submitted,
JOHN BLUME
CHRISTOPHER SEEDS, *On Brief*
SHERI LYNN JOHNSON, *On Brief*
Cornell Law School
112 Myron Taylor Hall
Ithaca, NY 14853-4901
(607) 255-1030

DONALD FELL
No. 05306-010
U.S.P. Terre Haute
P.O. Box 12015
Terre Haute, IN 47801

ALEXANDER BUNIN
Federal Public Defender
39 North Pearl St., 5th Floor
Albany, NY 12207
(518) 436-1850

Table of Contents

Table of Authorities ii

Statement Pursuant To Fed. R. App. P. 35(b)(1) 1

Argument 1

 I. The Panel’s Ruling Upholding the Excusal of Three Qualified
 Prospective Jurors Warrants En Banc Reconsideration by this Court
 1

 II. The Panel’s Opinion Contains Errors of Fact That Warrant
 Rehearing 11

Certificate of Compliance 14

Certificate of Service 15

Panel Slip Opinion 16

Table of Authorities

Cases

<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	3
<i>Lockhart v. McCree</i> , 476 U.S. 162 (1986)	10
<i>Snyder v. Louisiana</i> , 128 S.Ct. 1203 (2008)	3
<i>United States v. Fell</i> , 360 F.3d 135 (2d Cir. 2004)	2
<i>United States v. Fell</i> , No. 06-2882 (2d Cir. 2008) (slip op.)	<i>Passim</i>
<i>United States v. Quinones</i> , 511 F.3d 289 (2d Cir. 2007)	1, 2, 3, 4, 9, 10
<i>United States v. Torres</i> , 128 F.3d 38 (2d Cir. 1997)	2, 3
<i>Uttecht v. Brown</i> , 127 S.Ct. 2218 (2007)	1, 2, 3, 6, 7, 9, 10, 11
<i>Wainwright v. Witt</i> , 469 U.S. 412 (1985)	1, 2, 3, 7, 10, 11
<i>Witherspoon v. Illinois</i> , 391 U.S.510 (1968)	1, 10

Statement Pursuant to Fed. R. App. P. 35(b)(1)

Rehearing en banc is necessary in this case because the Panel’s opinion is in conflict with United States Supreme Court precedents in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985). Panel rehearing is required because the Panel’s opinion contains factual errors.

Argument

I. The Panel’s Ruling Upholding the Excusal of Three Qualified Prospective Jurors Warrants En Banc Reconsideration by this Court.

Under *Witherspoon* and *Witt*, a juror’s views on capital punishment “create an obstacle” sufficient to support striking the juror for cause when the juror’s views “would prevent or substantially impair the performance of [the juror’s duties],” to impartially consider the law and the facts. *Witt*, 469 U.S. at 424, 434. The United States Supreme Court interpreted *Witt* recently, and shortly after the parties filed initial briefs in this case, in *Uttecht v. Brown*, 127 S.Ct. 2218 (2007). Even more recently, and subsequent to the oral argument in Mr. Fell’s case, this Court applied the Supreme Court’s death-qualification jurisprudence for the first time, in *United States v. Quinones*, 511 F.3d 289 (2d Cir. 2007). Both *Uttecht* and *Quinones* emphasize the principle that in circumstances where a juror presents ambiguous responses about their ability to fairly decide between a life sentence and a death sentence, a trial court’s decisions to remove the juror is entitled to great deference, because the trial court “is

in a position to assess the demeanor of the venire.” *Uttecht*, 127 S.Ct. at 2224; *see Quinones*, 511 F.3d at 310. The principles of *Witt* as interpreted in *Uttecht v. Brown* and by this Court’s decision in *Quinones*, however, do not support the district court’s excusal of three qualified prospective jurors in Mr. Fell’s case. Because the *Fell II*¹ Panel’s decision (attached) – this Court’s second application of *Witt* after *Uttecht* – deviates from and would extend precedent, en banc rehearing is necessary.

The excusal of each of the three jurors at issue rests in the area akin to what this Court has referred as “inferred bias,” which “exists ‘when a juror discloses a fact that bespeaks a risk of partiality sufficiently significant to warrant granting the trial judge discretion to excuse the juror for cause’” *Quinones*, 511 F.3d at 301 (quoting *United States v. Torres*, 128 F.3d 38, 47 (2d Cir. 1997)). In *Quinones*, while finding that a district court did not abuse its discretion in excluding a prospective capital juror for cause based upon questionnaire responses alone, the Court nevertheless emphasized, citing *Uttecht* multiple times, the particularly important role of oral questioning when a juror’s responses are ambiguous or confused. As *Quinones* explained, “[t]o be adequate, *voir dire* need not establish juror partiality with ‘unmistakable clarity’”; rather, it must be sufficient to permit a trial judge to form “a

1

Another Panel of this Court previously addressed an interlocutory appeal by the government in this case. *See United States v. Fell*, 360 F.3d 135 (2d Cir. 2004).

definite impression that a prospective juror would be unable to faithfully and impartially apply the law.” 511 F.3d at 301 (quoting *Witt*, 469 U.S. at 424). And “the more ambiguous a prospective juror's responses, the more useful demeanor, and thus oral inquiry, become in allowing a trial judge to identify partiality warranting removal for cause.” *Id.* at 301-02.

The Panel decision in *Fell II* purports to follow *Quinones* and *Uttecht*. Having found that each of the prospective jurors at issue provided responses that were ambiguous or confused, the Panel deferred to the district court’s ability to factor the juror’s demeanor into its “assess[ment of] the attitude and qualifications of potential jurors.” *United States v. Fell*, No. 06-2882 (2d Cir. 2008), slip op. at 14 (quoting *Uttecht* and *Quinones*). The Panel quoted *Quinones*’s statement that “[t]he bluntness or hesitancy, confidence or discomfort displayed by prospective jurors as they respond to questions about the possibility of returning a capital verdict often reveals as much about bias as the actual answers given.” *Fell II*, slip op. at 18 (quoting *Quinones*, 511 F.3d at 301-02). But there is a significant caveat. As this Court previously held in a non-capital case that the Panel found instructive in *Quinones*, while a district court has discretion to dismiss a prospective juror on the basis of disqualifying bias inferred through demeanor, “the judge’s determination must be grounded in the facts

developed at voir dire.” *Torres*, 128 F.3d at 47.² A demeanor determination, for all its first-hand value, cannot be followed blindly under *Uttecht* and *Quinones*. When a district court’s ruling on a challenge for cause rests on an inaccurate view of the legal or factual circumstances at issue, it must be questioned. None of the Supreme Court precedent and none of this Court’s precedent says otherwise.

A. Juror 141

The district could excluded Juror 141 after finding it was “so close” that it would not be “fair to proceed with him.” *Fell II*, slip op. at 21. As the Panel states, the “record is clear” that the district court believed “that the juror would not be willing to follow the court’s instructions regarding the government’s theory that Fell could be eligible for the death penalty if he acted with conscious disregard of the fact that his criminal conduct exposed King to the risk of death.” *Fell II*, slip op. at 21 n.10 (referring to the Federal Death Penalty Act statutory gatekeeping factor found in 18 U.S.C. §3591(a)(2)(D)). What the Panel ignores and the district court did not acknowledge, however, is that the “reckless disregard” gatekeeping factor³ and the

2

See also Snyder v. Louisiana, 128 S.Ct. 1203, 1212 (2008), likening a *Witt* decision to the analysis under *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court stated that a reviewing court could not presume a trial judge relied upon demeanor to excuse a juror, unless there was evidence in the record to support that finding.

3

Section 3591(a)(2)(D) provides death eligibility for “[a] defendant who has been found guilty of . . .any . . . offense for which a sentence of death is provided, if the defendant as determined beyond

hypothetical circumstance that the government questioned Juror 141 about are not the same. The distinction explains Juror 141's responses and shows them to be consistent.

Section 3591(a)(2)(D) premises death-eligibility upon an intentional and specific act of violence that creates a grave risk of death, constitutes reckless disregard for human life, and *results in death*. The government's hypothetical, however, did not assert the last factor. As the Panel describes, the government asked Juror 141 whether he could consider the death penalty in a case that "didn't involve murder, but simply involved someone engaging in violence, knowing that the act created a grave risk of death – not premeditated murder" or in a case where the defendant "only [committed] an act that constituted a reckless disregard for human life, not that it was first degree or premeditated murder." *Fell II*, slip op. at 19 (quoting A.0213). To both questions, the juror answered no. As defense counsel objected during voir dire, because the government's hypothetical did not clarify that the crime had to result in death, it asked whether the juror would consider a death sentence in circumstances even where the victim was not killed, a category broader than the FDPA allows. When the district court later queried the juror using the same language but clarifying that the act resulted in death, the juror responded that he could consider the death penalty in those

a reasonable doubt . . . *intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants of the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a result of the act . . .*" (Emphasis added).

circumstances.

The Panel ultimately decided that Juror 141 was properly excused because he offered responses that “were not consistent or clear on whether he understood that the death penalty could be imposed for murder resulting from reckless disregard for human life and whether he would be able to apply it under such circumstances.” *Fell II*, slip op. at 21. But the inconsistency is fictive. The Juror was responding differently to two different questions, not wavering on one. When Juror 141 later conscientiously suggested to the court that he was “somewhat contradicting [him]self,” he referred to his ability to consider the death penalty in a death-resulting circumstance like the statute covers and as put to him by the district court, but not in the mere mens rea situation that the government initially posed. The Panel decision does not address or acknowledge this discrepancy. *Uttecht* does not support a reading under which it is appropriate to give such deference to a demeanor-based excusal of a potential juror in a capital case when the trial court’s ruling is based upon factual or legal mistake. Unlike Juror Z in *Uttecht*, Juror 141 never rejected a proper statement of the law and never said that he would not impose the death penalty in the circumstances the statute requires.

For Juror 141, as for the other challenged jurors, the demeanor determination turns at least in part on the actions of the parties in the courtroom. *Uttecht* took trial

counsel's lack of objection on excusal into account at length, finding it significant that "the State's challenge, [the defendant's] waiver of an objection, and the trial court's excusal for Juror Z support the conclusion that the interested parties present in the courtroom all felt that removing Juror Z was appropriate" *Uttecht*, at 2229; *id.* ("Brown's counsel offered no defense of Juror Z."); *id.* at 2229 (We nevertheless take into account voluntary acquiescence to, or confirmation of, a juror's removal."); *id.* at 2230 (declining to "treat the defense's acquiescence in Juror Z's removal as inconsequential"). The Panel's decision in *Fell II* gives short shrift to defense counsel's objections. While the Panel notes the fact that defense counsel objected, the Panel never addresses the legal issues to which the objections drew the district court's attention before the three qualified prospective jurors were dismissed.

B. Juror 195

The message of *Uttecht*'s emphasis on defense counsel's conduct is not simply that objections matter. It is that the circumstances in the courtroom, the collective understanding of the parties about the issues at stake, plays a role in assessing the legitimacy of a district court's *Witt* determinations. The Panel opinion in this case gives short shrift not only to defense counsel's objections, but also to defense counsel's position and the relationship between the parties on key facts at trial. This is critical with respect to Juror 195, who was a self-rated 8 of 10 – with 10 evincing

the highest support of the death penalty.

As the Panel decision notes, “[t]he district court’s decision to excuse juror 195 turned on her inconsistent and generally negative responses when asked whether she would consider imposing the death penalty for a single murder.” *Fell II*, slip op. at 22. And indeed, whether the juror would impose death for a single murder was the district court’s only concern with regard to this self-described strong supporter of the death penalty. *Accord Fell II*, slip op. at 22-24. Fell was charged with the murder of Teresca King, but the government offered the Rutland murders of Fell’s mother and her companion as one of three aggravating factors; the two other aggravating factors related to the death of Ms. King. Looking at the indictment in a vacuum, if a jury found only aggravating factors related to the death of Ms. King and rejected the multiple murder aggravating factor, Juror 195's views would have been an “obstacle” to considering a death sentence, as the Panel reasoned. *See Fell II*, slip op. at 23.

But Juror 195's views were not an obstacle in the context of this case. The defense did not contest Fell’s involvement in the Rutland homicides and thus there would have been no basis or reason for any juror not to find Fell’s involvement in those homicides established beyond a reasonable doubt. The whole of the Panel’s statement on this matter is that “[g]iven Juror 195's inconsistent positions, it is unlikely that she would have followed the court’s instructions if empaneled in this

case.” *Fell II*, slip op. at 24. The Panel determination, like the district court ruling – both focused solely on the single murder-multiple murder issue – ignore the reality of the parties’ position on the evidence. Juror 195 repeatedly stated that she would hear the evidence before making a decision and “try to make the best choice on what I hear.” A. 0265. What she would have heard is that Fell was involved in the murder of three people in a 24-hour period, not a single killing.

C. Juror 64

Voir dire is an exploration of jurors’ views in which the jurors’ themselves take active part. This is key in assessing the voir dire of Juror 64, the excusal of whom the Panel finds “the closest call.” *Fell II*, slip op. at 17. The Panel recognizes that Juror 64 was in the position of serving in a capital case for the first time and just coming to grips with translating her views on capital punishment to jury duty. And the Panel acknowledges that “[w]hile Juror 64 strongly opposed the death penalty and was unprepared to conclude that a defendant deserved death simply because a murder was premeditated, she simultaneously claimed that she could impose the death penalty as part of her responsibilities as a juror in spite of her expressed reluctance to do so.” *Fell II*, slip op. at 17. Citing the Court’s observation in *Quinones* that demeanor becomes a most useful factor when ambiguity arises, however, the Panel determined that because Juror 64 “repeatedly responded to the district court’s questioning with

ambiguous and qualified answers,” the district court properly concluded that Juror 64's views might substantially impair her duties. *Fell II*, slip op. at 18. Juror 64's candid acknowledgment that she would lean toward giving a life sentence was the district court's and the Panel's only concern.

Yet as the Panel asserts, consistent with the Supreme Court's death qualification jurisprudence, “[a] prospective juror is not required to affirm that she would favor, or lean toward, the death penalty under any particular circumstances in order to serve.” *Fell II*, slip op. at 16 (citing *Lockhart v. McCree*, 476 U.S. 162, 176 (1986)). Juror 64's responses were not confused; they reflect a conscientious juror grappling with the “greater seriousness and gravity” of her task. *Adams v. Texas*, 448 U.S. 38, 49 (1980). The Panel's ruling on Juror 64 strays from Supreme Court precedent. The Panel's decision penalizes jurors who, qualified under *Witt*, nevertheless disfavor the death penalty. The Court should reconsider the Panel decision en banc to address this issue of significant concern with respect to death qualification.

The Panel's decision promotes a dangerous misreading of *Uttecht* that “stack[s] the deck against” capital defendants. *Witherspoon*, 391 U.S. at 523. Neither *Uttecht* nor this Court's opinion in *Quinones* authorize unflinching deference where the record shows the trial court ruling is based on a mistaken interpretation of the circumstances. As Justice Stevens stressed in his dissent in *Uttecht*, the Court's decision and its

interpretation of *Witt* in that case “does not and cannot mean that jurors must be willing to impose a death sentence in every situation in which a defendant is eligible for that sanction. That is exactly the outcome [the Supreme Court] aimed to protect against in developing the standard” *Uttecht*, 127 S.Ct. At 2244 (Stevens, J., dissenting). Yet that is exactly the outcome that the Panel’s decisions on the jury issues in *Fell II* promotes. For these reasons, the Court of Appeals should grant rehearing en banc.

II. The Panel’s Opinion Contains Errors of Fact That Warrant Rehearing.

As the first case affirming a federal death sentence in this Circuit in approximately 40 years, all details are important. There are statements in the opinion that are factually incorrect.

The opinion states, “Fell’s mother moved to Rutland, Vermont in September 2000 and Fell joined her shortly thereafter.” *Fell II*, slip op. at 3. This is not correct and changes the nature of their relationship.

Debra Fell moved away from her children and lost custody of them in 1994, when Donny Fell was 13. Tr. 7/7/05 [1], pp. 25, 59. It is uncontested that she moved to Rutland in 1996, and did not see Donny again until he visited in the Fall of 2000.

The opinion states that after the stabbings in Rutland that Fell and Lee “... stole a shotgun from the house ...” *Fell II* slip op. at 3. The shotgun was not stolen from the

house. Fell brought it with him from Pennsylvania. *See* Tr. 6/21/05 [1], p. 20; Dkt. No. 1 (Criminal Complaint) (identifying the firearm as belonging to Fell).

The opinion states that Fell was “represented by the Federal Defender Service.” *Fell II*, slip op. at 6. There is no such entity. Pursuant to 18 U.S.C. §3006A the Districts of Northern New York and Vermont amended their Criminal Justice Act Plans for the appointment of a Federal Public Defender. The Federal Public Defender for the Northern District of New York, who is appointed by this Court of Appeals to renewable four-year terms, represented Donald Fell throughout this case.⁴

The opinion states, “[Jason Rushlow] conceded that Fell did not ‘resolve inmate grievances’ but instead ‘manufactured’ grievances based upon his purported religious beliefs.” *Fell II*, slip op. at 47. However, a review of Rushlow’s testimony uncovers no instance in which he used the term “manufactured,” nor was the word in any of the questions posed to him.

Whether or not these errors change the determination of any alleged point of error, the magnitude of this case, and its effect, requires they be corrected by the Panel.

⁴In 2006, the District of Vermont was appointed a separate Federal Public Defender.

DATED: July 11, 2008

Respectfully submitted,

ALEXANDER BUNIN
Federal Public Defender
Northern District of New York
39 North Pearl St., 5th Floor
Albany, NY 12207
Telephone: 518-436-1850
Facsimile: 518-436-1780

JOHN BLUME
CHRISTOPHER SEEDS, *On Brief*
SHERI LYNN JOHNSON, *On Brief*
Cornell Law School
112 Myron Taylor Hall
Ithaca, NY 14853-4901
(607) 255-1030

Certificate of Compliance with Fed. R. App. P. 32 (a)

Pursuant to 2ND CIR. R. 32 (a)(7), undersigned counsel certifies that this brief complies with the type-volume limitations, typeface requirements and type style requirements of Fed. R. App. P. 32 (a)(7).

1. This brief contains 2950 words within the type volume limitation of Fed. R. App. P. 32 (a)(7)(B) exclusive of the portions exempted by the rule.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in proportionally spaced typeface using Corel WordPerfect 12.0 software in Times New Roman, 14 point font in text and Times New Roman 12 point font in footnotes.
3. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32 (a)(7), may result in the Court's striking this brief and imposing sanctions against the person using the brief.

ALEXANDER BUNIN
Federal Public Defender
Northern District of New York

Certificate of Service

I, Lillian Spagnola, certify that today, July 11, 2008, one copy each of the Appellant's Brief and Appendix, were served upon Mr. William B. Darrow and Mr. Paul J. Van de Graaf, Assistant United States Attorneys, District of Vermont, by express mail, to 11 Elmwood Avenue, Burlington, Vermont 05401.

Lillian Spagnola