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Criminal Procedure: *Morgan v. Illinois* Takes a Step toward Eliminating Hanging Juries in Capital Cases

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I. Introduction

> *Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution.*
>
> — Supreme Court Justice Potter Stewart[1]

Notwithstanding Justice Stewart's declaration, capital murder defendants could not require trial court judges to ask prospective jurors whether they would automatically impose the death penalty if the defendant were found guilty until *Morgan v. Illinois*,[2] which held that capital murder defendants could exclude for cause jurors who would impose the death penalty regardless of any mitigating circumstances.[3] Capital murder defendants could not require the questioning prior to *Morgan* despite the fact that a juror who would automatically impose the death penalty would not be basing his or her verdict upon evidence introduced at the sentencing trial.[4]

In all thirty-seven U.S. jurisdictions which presently impose the death penalty,[5] jurors *must* consider aggravating circumstances and mitigating circumstances at the sentencing trial before the death penalty can even be contemplated.[6] Therefore, a

1. Witherspoon v. Illinois, 391 U.S. 510, 523 (1968).
2. 112 S. Ct. 2222 (1992).
3. *Id.* at 2229-30.
4. The requirement that a jury's verdict "must be based upon the evidence developed at trial" has been held to go to the "fundamental integrity of all that is embraced in the constitutional concept of trial by jury." Turner v. State, 379 U.S. 466, 472 (1965).
5. Those jurisdictions presently imposing the death penalty are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, the federal government, and the U.S. military. NAACP Legal Defense & Educ. Fund, Death Row, U.S.A. (Spring 1992) (on file with the *Oklahoma Law Review*).
6. This is true even in "non-weighing" states (states which do not statutorily require the sentencing jury to weigh aggravating circumstances against mitigating circumstances and only impose the death penalty if the aggravators outweigh the mitigation). Texas is one such "non-weighing" state; in upholding its sentencing scheme, the Supreme Court stated:

> [J]urors in Texas must determine whether the evidence presented by the State convinces them beyond reasonable doubt that each of the three questions put to them must be answered in the affirmative. *In doing so, they must consider both aggravating and mitigating circumstances* . . . . In essence, Texas juries must be allowed to consider "on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed."

Adams v. Texas, 448 U.S. 38, 46 (emphasis added) (quoting Jurek v. Texas, 428 U.S. 262, 271 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)).

juror who will impose only the death sentence once the defendant is found guilty is not an impartial juror capable of considering mitigating circumstances. Disregarding mitigating circumstances is a violation of a sentencing juror's duty because capital sentencers are required to consider all mitigating evidence.[7] Furthermore, it is arguable that a jury from which all jurors who oppose the death penalty have been excluded but from which no jurors who are automatically in favor of death have been excluded constitutes a "tribunal organized to return a verdict of death" which is biased in favor of the State.[8]

Therefore, excluding jurors who would *never* impose the death penalty as well as excluding jurors who would *automatically* impose the death penalty is essential to ensure an impartial jury. The Supreme Court allowed exclusion of jurors who would never impose the death penalty in *Witherspoon v. Illinois*[9] and *Wainwright v. Witt*.[10] *Morgan* resolved the issue surrounding jurors who would always impose the death penalty, and finally supplied the logical corollary to *Witherspoon* and *Witt*. Moreover, *Morgan* constituted the first real step toward eliminating hanging juries — those tribunals which have been organized to return only a verdict of death.

Part II of this note begins by summarizing the law prior to *Morgan*. In part III, *Morgan*'s majority opinion and Justice Scalia's dissent are summarized. Part IV of the note analyzes the impact of *Morgan* on the fairness of capital murder trials. The note concludes in part V that *Morgan* helps to ensure fairness in the capital sentencing process and represents a logical extension of the rules of *Witherspoon* and *Witt*.

II. Law Preceding Morgan

A. The Concept of Impartiality

Before the Sixth Amendment[11] was even made applicable to the states by virtue of the Fourteenth Amendment,[12] the Supreme Court held that when a state accorded a defendant a jury trial, the Fourteenth Amendment required the jury to be compiled

7. Mills v. Maryland, 486 U.S. 367 (1988); *see also* Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that full consideration of mitigation enhances reliability of the sentencing decision, therefore capital sentencers must be allowed to consider and give full effect to mitigating evidence); Hitchcock v. Dugger, 481 U.S. 393 (1987) (stating that sentencer cannot be precluded from hearing or cannot refuse to consider any relevant mitigating evidence); Eddings v. Oklahoma, 455 U.S. 104 (1982) (holding that mitigating evidence cannot be excluded from the sentencer's consideration); Lockett v. Ohio, 438 U.S. 586 (1978) (explaining that sentencer may not be precluded from considering relevant mitigating evidence).

8. Witherspoon v. Illinois, 391 U.S. 510, 521 (1968).

9. *Id.* at 510.

10. 469 U.S. 412 (1985).

11. The Sixth Amendment provides in relevant part: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury . . . ." U.S. CONST. amend. VI (emphasis added).

12. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Supreme Court, in an opinion written by Justice White, decided that the Sixth Amendment right to a jury trial was fundamental and, therefore, applicable to the states by virtue of the Fourteenth Amendment.

of a panel of impartial, indifferent jurors.[13] The Sixth Amendment specifically provides for trial by an impartial jury by its terms.[14] Because there is no right to a jury during the sentencing hearing of a capital trial,[15] these cases provided precedent for the determination that when the state did provide for juries at sentencing, the Due Process Clause of the Fourteenth Amendment required impartial sentencing juries to the same extent that the Sixth Amendment required impartial juries at the guilt phase.[16]

Voir dire, the process of asking prospective jurors questions in order to determine their fitness to serve, is perhaps the only way to determine whether or not they are impartial. Yet, as a general rule, the Supreme Court has held that questioning jurors over matters in which they might foster some prejudice is not always mandated by the Constitution.[17] The result is that if the questioning is refused by the trial judge, it will not be held reversible constitutional error on appeal.[18] The reasoning behind this result is that "the determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge."[19]

Before *Morgan* there was one limited exception to the general rule of not constitutionally requiring questioning. There was one type of questioning which had been held constitutionally required during voir dire to ensure an impartial jury, prohibiting a trial judge from using his discretion to refuse the questioning. *Turner v. Murray*[20] held that due to the "qualitative difference" between death and all other punishments, questioning during voir dire which sought to elicit racial prejudice was constitutionally required.[21] The only distinguishing factor between *Turner* and *Ristaino v. Ross*,[22] an earlier case which held inquiry into racial prejudice was not required, was that *Turner* was a capital case.[23] The result was different in the capital context because the concept of impartiality in capital cases requires capital sentencers to consider mitigating circumstances.[24] *Turner* stands for the proposition that racial prejudice may infect this important task at sentencing, and therefore questioning to elicit the bias is required in order for an impartial jury to be empaneled.[25]

13. *See* Turner v. State, 379 U.S. 466, 472 (1965); Irvin v. Dowd, 366 U.S. 717, 722 (1961).

14. "In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury* . . . ." U.S. CONST. amend. VI (emphasis added).

15. *See Morgan*, 112 S. Ct. at 2235; Walton v. Arizona, 497 U.S. 639, 647-49 (1990); Clemons v. Mississippi, 494 U.S. 738, 745-46 (1990); Cabana v. Bullock, 474 U.S. 376, 385 (1986); Spaziano v. Florida, 468 U.S. 447, 464 (1984).

16. *See Morgan*, 112 S. Ct. at 2236 (dissent); Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality).

17. Ristaino v. Ross, 424 U.S. 589, 594-95 (1976).

18. *Id.*

19. *Id.* (quoting Rideau v. State of Louisiana, 373 U.S. 723, 733 (1963)).

20. 476 U.S. 28 (1986).

21. *Id.* at 35 (quoting California v. Ramos, 463 U.S. 992, 998-99 (1983)).

22. 424 U.S. 589 (1976).

23. *Turner*, 476 U.S. at 33.

24. *See supra* note 7 and accompanying text.

25. *Turner*, 476 U.S. at 35.

Mu'Min v. Virginia[26] dealt with voir dire questions about the effect of pretrial publicity[27] on juror impartiality. The Supreme Court rejected the argument that failure to allow questioning over what specific publicity the jurors had been exposed to was reversible error, as long as general questions on the subject were asked.[28] The standard established was that the requested questioning must be more than merely helpful. In order to be constitutionally compelled (required by the constitution with failure to ask resulting in reversible error), the defendant's trial must be rendered fundamentally unfair by the trial court's failure to ask these questions.[29] Only if this standard was met would the concept of impartiality require requested questioning.[30]

B. Excluding Impartial Jurors

1. Death Qualification Cases

In order to obtain an impartial jury, it is elementary that both parties must exclude those members of the jury who are not impartial. Prejudiced jurors may be stricken for cause, and there is no limit to the number of "for cause" challenges one can utilize.[31] By contrast, a juror who is impartial may not be stricken for cause.[32] This is important in capital cases because jurors who may be opposed to the death penalty may nevertheless be able to put their personal convictions aside and follow the law.[33] Exclusion of these jurors for cause on the ground that they would be partial toward the defendant would be improper, and result in a jury that is instead partial toward the State.[34] The Supreme Court has addressed the exclusion of jurors who have been "death qualified," or asked about their abilities to impose the death penalty.

In *Witherspoon v. Illinois*,[35] the Supreme Court granted certiorari to consider the constitutionality of an Illinois statute allowing the exclusion for cause of venire members[36] who "might hesitate" to return a death sentence.[37] In *Witherspoon*,

26. 111 S. Ct. 1899 (1991).

27. Pretrial publicity may so taint a jury pool and preclude impartiality that the defendant will be Constitutionally entitled to a change of venue. Irvin v. Dowd, 366 U.S. 717 (1961).

28. *Mu'Min*, 111 S. Ct. at 1908.

29. *Id.* at 1905.

30. *Id.*

31. For an academic discussion of the entire jury selection process, see JAMES A. INCIARDI, CRIMINAL JUSTICE 444-50 & n.34 (3d ed. 1990); *see also* Patrick W. Peters, *Capital Voir Dire: A Procedure Gone Awry*, 58 UMKC L. REV. 603, 608-10 (1990) (discussing general voir dire procedure in Missouri, which is similar to Oklahoma's statutory procedure).

32. Wainwright v. Witt, 469 U.S. 412, 420-21 (1985).

33. Witherspoon v. Illinois, 391 U.S. 510, 515 nn.7, 9 (1968).

34. "In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die [which is the State's position in capital cases]." *Id.* at 520-21.

35. 391 U.S. 510 (1963).

36. Venire members, also called prospective jurors, are members of the general public who have been summoned for jury service and make up the pool of persons from whom the State and the defense ultimately select the jury that hears the case (termed the petit jury). For an explanation of the entire jury

nearly half the prospective jurors had been eliminated under authority of the statute; those who ultimately sentenced the petitioner to die were chosen from the pool of jurors who remained.[38]

The Court held that a capital defendant's rights under the Sixth and Fourteenth Amendments to an impartial jury prohibited the exclusion of prospective jurors simply because they voiced "general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[39] According to *Witherspoon*, the exclusion of prospective jurors must be *limited* to those jurors who made it "unmistakably clear" that (1) they were irrevocably committed to *automatically* vote against the death penalty regardless of the evidence; or (2) their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*."[40]

Later decisions clarified that *Witherspoon* was not a *ground* for excluding potential jurors; rather, it was a *limitation* on the State's power to exclude.[41] Hence, the State could not use *Witherspoon* to *require* the exclusion of jurors who were against the death penalty; instead, if the State were allowed by the trial court to exclude jurors based on their feelings against the death penalty, *Witherspoon limited* exclusion to those jurors who would never impose the death penalty and *prohibited* exclusion of jurors who were against the death penalty but could nevertheless follow the law and impose it in proper cases.

Soon after *Witherspoon* was decided, *Furman v. Georgia*[42] invalidated Texas and Georgia death sentences and, in effect, the death penalty statutes of all other states on the ground that the death penalty was being applied in an arbitrary and capricious manner in violation of the Eighth Amendment.[43] The ban on capital punishment did not last long, and five years later revised post-*Furman* death penalty statutes passed constitutional challenge in *Gregg v. Georgia*.[44]

Davis v. Georgia,[45] the Supreme Court's first post-*Gregg* opinion in a capital case, continued to treat *Witherspoon* violations as reversible constitutional error.[46] The Court upheld the excusal of jurors who made it "'unmistakably clear' that they could not be trusted to 'abide by existing law' and 'to follow conscientiously the instructions' of the trial judge."[47] This was significant because the prospective jurors never said they would *automatically* vote against the death penalty. By

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selection process, see INCIARDI, *supra* note 31, at 444-50.

37. *Witherspoon*, 391 U.S. at 513.
38. *Id.*
39. *Id.* at 522.
40. *Id.* at 523 n.21.
41. *See* Adams v. Texas, 448 U.S. 38, 47-48 (1980).
42. 408 U.S. 238 (1972).
43. *Id.* at 239-40.
44. 428 U.S. 153 (1976).
45. 429 U.S. 122 (1976) (per curiam).
46. *Id.* at 123.
47. Lockett v. Ohio, 438 U.S. 586, 596 (1978).

upholding their exclusion, the Court ignored the first prong of *Witherspoon* and foreshadowed the change to come.

The Court reexamined the *Witherspoon* standard in *Adams v. Texas*.[48] In *Adams*, the Court reviewed previous cases which dealt with jury exclusion and stated: "This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment *unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.*"[49]

The Court noted that *Witherspoon* is not a ground for challenging any prospective juror. Rather, *Witherspoon* is a limitation of the State's power to exclude. Therefore, "if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out."[50]

The Supreme Court revisited *Witherspoon* in *Wainwright v. Witt*.[51] The Court expressly adopted the standard for exclusion it had set forth in *Adams v. Texas*.[52] *Adams* dispensed with the reference to "automatic" decision making in the first prong of *Witherspoon*.[53] This resulted in the merging of the two prongs of *Witherspoon* in *Witt*: (1) the state no longer had the high burden to prove with "unmistakable clarity" that the juror was biased; and (2) there was no longer the requirement that a juror had to state he would *never* vote for the death penalty before exclusion was possible.[54]

According to *Witt*, the relevant inquiry now became "whether the juror's views could 'prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath.'"[55] The Court's reformulation of the standard for excluding jurors based on cause was significant: exclusion was no longer technically limited in the language of the opinion to situations in which venire persons said they would *never* consider the death penalty.[56] This created the opportunity to argue that jurors who would consider *only* the death penalty were also excludable for cause.[57]

In *Lockhart v. McCree*,[58] the Court considered whether it was error to remove prospective jurors from the guilt/innocence phase who could not impose the death

48. 448 U.S. 38 (1980).

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

50. *Adams*, 448 U.S. at 48 (quoting Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968)).

51. 469 U.S. 412 (1985).

52. 448 U.S. 38 (1980); *see Witt*, 469 U.S. at 424.

53. *Witt*, 469 U.S. at 424.

54. *Id.* at 420.

55. *Id.* (quoting *Adams*, 448 U.S. at 45).

56. Recall that in *Witherspoon*, the standard for exclusion was worded, "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they *voiced general objections to the death penalty* or expressed conscientious or religious scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) (emphasis added).

57. *Morgan*, 112 S. Ct. at 2229.

58. 476 U.S. 162 (1986).

penalty at the sentencing phase.[59] Social science studies indicated that "death qualification" produced jurors who were more prone to convict at the guilt/innocence stage.[60] The Court assumed that these studies were both methodologically valid and adequate to establish that "death qualification" in fact produces juries somewhat more "conviction-prone" than "non-death-qualified" juries.[61] The Court nonetheless held that the Constitution did not prohibit the states from "death qualifying" juries in capital cases.[62] Moreover, according to the Court, "death qualification" does not violate the Sixth Amendment fair cross-section requirement because the essence of that claim is the systematic exclusion of "a 'distinctive' group in the community."[63]

Jurors excluded on *Witherspoon* and *Witt* grounds were not a 'distinctive' group analogous to blacks, women, or Mexican-Americans because they were being excluded for an attribute within their control.[64] Relying on *Witt*, the Court also rejected the argument that petitioner's right to an impartial jury had been violated because the absence of "*Witherspoon*-excludables" slanted the jury in favor of conviction.[65] Finally, the Court stated that "an impartial *jury* consists of nothing more than '*jurors* who will conscientiously apply the law and find the facts.'"[66]

The Court reaffirmed *Davis v. Georgia*[67] (the Supreme Court's first post-*Gregg* opinion in a capital case) in *Gray v. Mississippi*.[68] In *Gray* the Court declined the invitation to overrule *Davis* and analyze the improper excusal of jurors for cause under harmless error analysis, reasoning that the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury, and the impartiality of the adjudicator goes to the very integrity of the legal system.[69] According to the Court, some constitutional rights, such as an impartial adjudicator, are so basic to a fair trial that infractions simply are not "harmless error."[70]

2. Life Qualification Cases

As early as 1919 there were problems with jurors who would automatically impose the death penalty. *Stroud v. United States*,[71] for example, involved the

59. Arkansas' capital murder scheme provided for a guilt/innocence phase and a sentencing phase. At the guilt phase the jury returned a verdict of guilt or innocence but did not consider punishment. Then a second "mini-trial" technically called the sentencing phase was held in which evidence of aggravation and mitigation was presented. The jury decided the proper punishment for the particular defendant at the sentencing phase. ARK. CODE ANN. § 5-4-602 (Michie 1987).

60. *Lockhart*, 476 U.S. at 172-73.

61. *Id.* at 173.

62. *Id.*

63. *Id.* at 174.

64. *Id.* at 176.

65. *Id.* at 177-78.

66. *Id.* at 178 (emphasis in original).

67. 429 U.S. 122 (1976) (per curiam). *See supra* note 45 and accompanying text.

68. 481 U.S. 648 (1987).

69. *Id.* at 668 (citing Chapman v. California, 386 U.S. 18 (1967)).

70. *Id.* at 668 (citations omitted).

71. 251 U.S. 15 (1919).

stabbing murder of a prison guard by Stroud, an inmate.[72] The Court denied the defendant's motion to challenge for cause a prospective juror who favored nothing less than capital punishment for first degree murder.[73] The Court agreed that the challenge should have been granted, but because the defendant was given twenty-two instead of twenty peremptory challenges and exercised one of them to excuse the objectionable juror, his rights were not abridged by the erroneous ruling as to the challenge for cause.[74] Because no juror who in fact sat upon the trial was objectionable, the Court affirmed the death sentence.[75]

In *Ross v. Oklahoma*,[76] perhaps the most important case preceding *Morgan*, a juror stated that he would vote to impose the death penalty automatically if the defendant were found guilty. Defense counsel moved to have the prospective juror removed for cause, but the trial court refused the request. The defense then used a peremptory challenge to remove him.

Although the Court ultimately found no error, in dicta the Court stated that if the prospective juror had actually served and petitioner had preserved his right to challenge the trial court's failure to remove the venire person for cause (by objecting and not having another peremptory available with which to excuse the prospective juror), then "the sentence would have to be overturned."[77] However, as it stood, the Court applied a harmless error analysis because "so long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated."[78] Thus, according to *Ross* the defendant's right to a peremptory challenge was not denied or impaired because he received all that his state's law required.[79]

Ross indicates that jurors who would *always* impose the death penalty are just as flawed as jurors who would *never* impose the death penalty; neither follow the rule requiring a consideration of mitigation and aggravation before such a decision can be made. In fact, some dissenting judges in the early cases alluded to this possibility.[80] However, unless provided by individual state law, the defense had no authority to require this type of voir dire if the trial court refused it. The lower

72. *Id.* at 16.
73. *Id.* at 20, 21.
74. *Id.*
75. *Id.*
76. 487 U.S. 81 (1988).
77. *Id.* at 85.
78. *Id.* at 88.
79. Oklahoma required a defendant who disagreed with a trial court's ruling on a for cause challenge to preserve the claim by exercising a peremptory challenge to remove the juror. Even then, the error is grounds for reversal only if the defendant exhausts his peremptories and an incompetent juror is forced upon him. *Ross*, 487 U.S. at 89. However, the Court did note that no claim was being made that the trial court repeatedly and deliberately misapplied the law in order to force the appellant to use his peremptories to correct the errors, implying such behavior could possibly result in error even if an incompetent juror did *not* ultimately sit. *Id.* at 91 n.5.
80. *See* Adams v. Texas, 448 U.S. 38, 52 (1980) (Rehnquist, J., dissenting).

courts remained split as to whether or not such questioning was necessary to ensure an impartial jury.[81] Thus, *Morgan* was long overdue.

III. Morgan v. Illinois

A. Factual Background

Derrick Morgan was convicted of first degree murder.[82] After considering evidence of the aggravating and mitigating factors, the jury sentenced him to death.[83] The evidence at trial indicated that Morgan lured a drug dealer who was also a friend into an abandoned apartment and shot him six times in the head.[84] El Rukns, one of Chicago's violent inner-city gangs, allegedly hired Morgan to kill the competing drug dealer for $4000.[85]

During voir dire, seventeen prospective jurors were excused when they expressed substantial doubts about their ability to follow Illinois law in deciding whether to impose a sentence of death.[86] The jurors were excused following "death qualification" questions pursuant to *Witherspoon* and *Witt*.[87] However, the trial court refused defense counsel's request to ask the prospective jurors if any of them would automatically vote to impose the death penalty, no matter what the facts, if Morgan were found guilty.[88] The Supreme Court of Illinois affirmed, rejecting the claim that pursuant to *Ross v. Oklahoma*,[89] voir dire must include the "life qualifying" or "reverse-*Witherspoon*" question upon request.[90]

B. The Majority Decision

Certiorari was granted by the United States Supreme Court to decide whether during voir dire for a capital offense a state trial court may, consistent with the Due Process Clause of the Fourteenth Amendment, refuse inquiry into whether a potential juror would automatically impose the death penalty upon conviction of the defendant.[91] The Supreme Court reversed the Illinois court, holding that Morgan was entitled, upon his request, to inquiry aimed at discerning those jurors who, even prior to the State's case-in-chief, had predetermined whether or not the death penalty should be imposed.[92] It was reasoned that such a conviction by jurors reflected directly on their inability to follow the law.[93] Inadequacy of the voir dire created doubt in the Court's mind as to whether Morgan was sentenced to death by a jury

81. *See Morgan*, 112 S. Ct. at 2227 nn.3, 4.
82. *Id.* at 2226.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. 487 U.S. 81 (1988).
90. *Morgan*, 112 S. Ct. at 2227.
91. *Id.*
92. *Id.* at 2223.
93. *Id.*

empaneled in compliance with the Fourteenth Amendment, resulting in reversal of Morgan's death sentence.[94]

Noted in the opinion was that *Witt* allows the removal for cause of those jurors whose views on the death penalty substantially impair their ability to perform their duties according to their oath and the law; and that it is the adversary seeking exclusion who must demonstrate through questioning that the potential juror lacks impartiality. Accordingly, the Court reasoned:

> Were *voir dire* not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would *always* impose death following conviction, his right to not be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would *never* do so.[95]

C. The Dissenters

Justice Scalia, with whom Chief Justice Rehnquist and Justice Thomas joined, filed a spirited dissent. They disagreed with the majority's conclusion for two reasons.

First, Scalia did not view the issue in the case as involving a juror who would ignore the requirement of finding an aggravating factor (and thus one who would not be following the law).[96] Instead, Scalia perceived the issue as one in which certain veniremen could never find enough mitigation once aggravation was found to preclude returning a death sentence.[97] By viewing the issue in this way, Scalia believed the requested questioning was not constitutionally necessary to ensure an impartial jury.

Second, all three dissenting Justices would have agreed with the majority "if it were true that the instructions required jurors to deem certain evidence to be 'mitigating' and to weigh that evidence in deciding the penalty."[98] However, they did not feel the instructions given precluded a juror from taking the view that capital murder always warranted a death sentence. In Scalia's view, the instructions indicated that if the jury found at the death-eligibility stage that Morgan committed a contract killing, that was necessarily an aggravator and then each juror could determine whether there was any evidence that would be mitigating. Thus, according to Scalia, Illinois law does not preclude a juror from taking the bright-line position that there are no valid reasons why a defendant who has committed a contract killing should not be sentenced to death, as such a juror does not "fail . . . to consider the evidence."[99]

94. *Id.* at 2235.
95. *Id.* at 2232 (emphasis in original).
96. *Id.* at 2236.
97. *Id.*
98. *Id.* at 2237.
99. *Id.*

IV. Morgan Analysis

In capital cases where the defendant's very life is in the hands of twelve people, the idea that the trial will be decided by a "hanging jury" seems preposterous. Yet, although the Supreme Court considered "death qualification" as early as 1968,[100] life qualification did not become law until the 1992 *Morgan* decision. *Morgan* is a landmark case which will have far-reaching implications in capital cases.

A. Impartiality Has Come Back to Life

Until *Morgan*, the Supreme Court had weakened the notion of what constituted an "impartial" jury.[101] For example, as recently as 1991 the Court held it was not a violation of the right to an impartial jury to refuse requested questioning of prospective jurors about the content of the pretrial publicity to which they had been exposed.[102] This was despite the acknowledgment that this information "might have been helpful in assessing whether a juror is impartial."[103] Thus, it appeared the force of *Ross* and *Mu'Min*'s predecessors, which dealt strictly with Sixth Amendment violations, had been eradicated.[104]

Morgan, however, breathed new life into these earlier cases by dealing strictly with the Sixth Amendment violation it confronted. By refusing to apply the same kind of harmless error analysis employed in *Ross* and *Mu'Min*,[105] the *Morgan* Court affirmatively renewed the importance of the right to an impartial jury. The fact that jurors affirmatively answered general impartiality questions could have been used to apply a harmless error analysis as was done in *Mu'Min*, which held that questions over what *specific* publicity the jury was exposed to were not constitutionally compelled if the jury had been asked *general* questions on jury impartiality.[106] *Morgan*, however, specifically rejected the argument that general impartiality questions satisfied the impartiality requirement.[107] This is a significant departure which should rekindle the hope that relief once again will be granted on jury impartiality grounds, and which should likewise dispel the assumption born of *Ross* and *Mu'Min* that jury impartiality issues will simply be discarded under a harmless error analysis. This is a correct result, as the Sixth Amendment right to

100. Witherspoon v. Illinois, 391 U.S. 510 (1968). *See supra* notes 35-41 and accompanying text.

101. *See* Mu'Min v. Virginia, 111 S. Ct. 1899 (1991) (explaining that it is harmless error to refuse specific questions even if helpful in determining impartiality, as long as general questions asked); Ross v. Oklahoma, 487 U.S. 145 (1968) (stating that harmless error occurs if court denies for cause challenge of impartial juror when defendant exercised a peremptory challenge to remove the juror).

102. *Mu'Min*, 111 S. Ct. at 1908.

103. *Id.* at 1905.

104. *See* Irvin v. Dowd, 366 U.S. 717 (1961); Turner v. State, 379 U.S. 466 (1965); Duncan v. Louisiana, 391 U.S. 145 (1968). *See* discussion *supra* part II.A.

105. Ross v. Oklahoma, 487 U.S. 81 (1988); Mu'Min v. Virginia, 111 S. Ct. 1899 (1991) (discussed *supra* note 101).

106. *Mu'Min*, 111 S. Ct. at 1905.

107. *Morgan*, 112 S. Ct. at 2232.

an impartial jury is fundamental,[103] and thus should not be treated under a harmless error analysis.[109]

Morgan is also a groundbreaking decision in that its language supports the proposition that a capital defendant has the right to *any* questioning which could lead to the exclusion for cause of prospective jurors:

> We deal here with petitioner's ability to exercise intelligently his complementary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt. Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose the death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would never do so.[110]

Morgan may undermine *Mu'Min*. Perhaps now a defendant should be entitled to know the content of pretrial publicity if she can argue that the content has caused venire persons to solely consider the death penalty as a punishment. For example, an article may contain a story about the defendant's past crimes, render an opinion that the defendant will be a continuing threat to society,[111] and conclude that death is the only punishment appropriate for such a person for society's sake. In such a case, *Morgan* arguably requires questioning into the content of the publicity so that it can be determined which jurors have been affected by the publicity to the extent that they will only consider the death penalty.

Morgan's language also supports the proposition that capital defendants are entitled to questioning regarding prospective jurors' ability to consider *any* mitigating evidence. The *Morgan* Court clearly stated: "[A]ny juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial."[112]

Given this reasoning, it is evident that *Morgan* may require specific questioning on whether jurors will consider certain evidence as mitigating or not. For example, defense attorneys can cite *Morgan* as entitling them to ask prospective jurors whether they can consider specific factors (such as a particular defendant's age or a bad family background) as mitigating which the defense anticipates putting on at sentencing stage. *Morgan* entitles defendants to this line of questioning and to exclusion for cause of jurors who state they are unable to consider[113] all or even

108. Duncan v. Louisiana, 391 U.S. 145 (1968).

109. *See* Ake v. Oklahoma, 470 U.S. 68 (1985).

110. *Morgan*, 112 S. Ct. at 2232.

111. Continuing threat is an aggravating circumstance in many death-penalty jurisdictions which permits imposition of the death penalty once it is found. *See, e.g.*, 21 OKLA. STAT. § 701.12(7) (1991).

112. *Morgan*, 112 S. Ct. at 2235.

113. Note that the inquiry is to whether they will *consider* the mitigating evidence, not to whether they will give it any *weight*. Of course, jurors are allowed to give no weight to mitigating evidence *once*

some of the anticipated mitigating evidence. This is a good result, especially in the context of the death penalty where the punishment is the most severe provided by law, and irreversible once imposed. In such a serious case, it is imperative that defense attorneys be given ample opportunity to elicit any prejudice of prospective jurors.

Morgan also may require the identification and exclusion of persons with strong pro-death penalty views even when they would not *automatically* impose the death penalty. When the Supreme Court eliminated the "automatically" language in *Witherspoon* in favor of the *Witt* standard of substantial impairment of the ability to follow the law,[114] the State was allowed the right to exclude a larger group of anti-death penalty persons. Therefore, by analogy the defense should be allowed to exclude a larger group of pro-death penalty persons than those who state they would automatically impose the death penalty. Those jurors whose pro-death penalty views are so strong that their ability to fulfill their duty would be substantially impaired should be excludable under *Morgan*. This ensures fairness and unanimity between the state and the defense.

B. Juror's Own Views on Their Impartiality

One 1987 study found that twenty-six out of thirty-two persons who would automatically impose the death penalty also stated they "would not be substantially impaired or prevented from performing their juror duties despite having also stated that they would always vote for the death penalty for guilty capital defendants."[115] This led the study's authors to conclude that "at least some potential jurors are not aware that failure to consider all punishment options in the penalty phase of the trial is a violation of the juror duties."[116]

Another study supported this finding, when only sixteen persons said their attitude toward the death penalty was so strong that it would seriously affect their abilities to perform their juror duties, but upon further questioning forty-two of them said that regardless of the evidence they would always give the death penalty for capital murder.[117]

Morgan is significant because it affirmatively recognizes that jurors can honestly believe they are impartial when in fact they are not.[118] Furthermore, this reality was at least partly the basis for *Morgan*'s holding that general questions do not

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they have considered it, but they cannot give the evidence no weight by excluding it from their consideration. Eddings v. Oklahoma, 455 U.S. 104 (1982).

114. *See* discussion *supra* part II.B.1 (death qualification cases).

115. Michael L. Neises & Ronald C. Dillehay, *Death Qualification and Conviction Proneness: Witt and Witherspoon Compared*, 5 BEHAVIORAL SCI. & L. 479, 493 (1987).

116. *Id.* at 492.

117. *See* Brief of the National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 10-11, *Morgan* (No. 91-5118) (on file with the *Oklahoma Law Review*) (citing Marla Sandys & Robert C. Dillehay, Juror Qualification Under the New *Wainright v. Witt* Standard: A Test of Jurors' Ability To Anticipate Their Role 7 (paper presented at the meetings of the Southeastern Psychological Ass'n, Apr. 1987)).

118. *Morgan*, 112 S. Ct. at 2233.

suffice and specific questions on impartiality are required.[119] This provides capital defense attorneys with authority to elicit more information upon which the decision of whom to excuse will be based. The *Morgan* Court issued a favorable and just decision which should be utilized by defense attorneys to ensure that while their client is on trial for his life, he is tried by an impartial adjudicator.

C. Impact on Those Already Sentenced to Death

Morgan's impact is substantial on individuals sentenced to death after having been refused a request for "life qualification" questioning. *Morgan* unquestionably entitles defendants to a new sentencing hearing when they have preserved the error and are now on direct appeal.[120]

More significantly, *Morgan* should also provide relief for defendants at the post-conviction stage, as it is based upon prior precedent of the Court.[121] Because it is based on precedent, it does not announce a "new rule"[122] for retroactivity purposes and thus does not foreclose habeas petitioners from raising the failure to excuse jurors for cause who would automatically impose the death penalty as reversible error at the post-conviction stage.[123]

Morgan's impact on individuals who have already been sentenced to death but who did *not* request the "life qualification" questioning at trial may be minimal. *Morgan* specifically stated that "on voir dire the court must, *on defendant's request*, inquire into the prospective juror's views on capital punishment. . . ."[124] Therefore, the defendant must "exercise intelligently his complementary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt."[125] The language indicated that no error can be claimed by defendants who did not request the "life qualification" questioning. A finding of error on impartiality grounds is based partly on the notion that adequate voir dire is an essential part of the defendant's

119. *Id.*

120. The law has not yet been "frozen" for these individuals; defendants get the benefit of any changes in the law between the time of trial and the time the Supreme Court denies certiorari (or the time to petition for certiorari has expired). Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965). Furthermore, it is argued *infra* that Morgan does not announce a "new rule" for retroactivity purposes; and assuming, arguendo, that Morgan does announce a "new rule," defendants on direct appeal still benefit from it. Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

121. It is a logical application of the law as it has evolved from Witherspoon v. Illinois, 391 U.S. 510 (1968) and its progeny, especially Ross v. Oklahoma, 487 U.S. 81 (1988).

122. A "new rule" is defined as one which "breaks new ground or imposes a new obligation on the States or the Federal Government . . . [t]o put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." Teague v. Lane, 109 S. Ct 1060, 1070 (1989).

123. When a petitioner seeks federal habeas relief based on a principle announced after a final judgment, it must first be determined whether the decision relied upon created a new rule. If not, relief may be granted only if it is also determined that granting the relief sought will not create a new rule by applying the prior decision in a novel setting which extends the precedent. Stringer v. Black, 112 S. Ct. 1130, 1135 (1992).

124. *Morgan*, 112 S. Ct. at 2230-31.

125. *Id.* at 2232.

right to an impartial jury.[126] Consequently, it appears that a defendant cannot complain that he was *denied* adequate voir dire if he failed to *request* an adequate voir dire — he must have requested the reverse — *Witt* questioning and have been denied, or have been granted the questioning but then have had his for-cause challenge denied. A defendant would not know whether or not a for-cause challenge is necessary without questioning the jury. Accordingly, where there is no requested questioning, there may be no constitutional violation. Under this analysis, defendants who did not request the questioning most likely waived the rights set forth in *Morgan*.

However, relief may still be available to defendants who were sentenced by juries who were not questioned. The Court did hold that the failure to ask the jury the reverse-*Witt* questions resulted in inadequate voir dire.[127] This is true if the failure to question was because the court refused to allow it *or* if the failure to question occurred because defense counsel never requested it since there was no legal basis to do so. The result is the same: an empaneled jury not in compliance with the Fourteenth Amendment.

The Supreme Court analyzed the way Oklahoma conducted its waiver[128] rule in *Ake v. Oklahoma*.[129] In *Ake*, the Court decided that Oklahoma's waiver rule does not apply to fundamental error, and under Oklahoma law, federal constitutional errors are "fundamental."[130] Under *Ake* it can be argued that the right to "life qualification" questioning is not waivable because failure to conduct the questioning results in an inadequate voir dire in violation of the Sixth Amendment. A Sixth Amendment violation is fundamental constitutional error, as the right to an impartial jury is a fundamental constitutional right.[131] Thus, one could argue that the waiver rule cannot apply to *Morgan* errors. In addition, it is important to remember that it has been said that there is a presumption against the waiver of constitutional rights.[132]

V. Conclusion

Morgan is beneficial to capital trial lawyers and death penalty defendants. States which did allow the "life qualification" questioning on voir dire prior to *Morgan* had nearly as many causal strikes as those resulting from the "death qualification" questioning, indicating that granting both types of questioning "goes a long way

126. *Id.* at 2230.

127. *Id.* at 2235.

128. Certain rights are "waivable" by criminal defendants. A waiver is the intentional relinquishment or abandonment of a known right or privilege. *See* Brookhart v. Janis, 384 U.S. 1 (1966). Waiver most often occurs in situations where defendants fail to object, resulting in a bar from subsequently raising the error to which there was no objection.

129. 470 U.S. 68 (1985).

130. *Id.* at 74-75.

131. Duncan v. Louisiana, 391 U.S. 145 (1968).

132. *Brookhart*, 384 U.S. at 4 (also a Sixth Amendment case) (holding it reversible error to refuse cross-examination and confrontation of witnesses without valid waiver, which must be an intentional relinquishment or abandonment of a known right or privilege).

toward leveling the playing field."[133] After *Morgan*, all states must, in effect, "level their playing fields," ensuring fairness for capital defendants.

Morgan provides a tool that, if utilized, will help ensure that the jury ultimately selected will not be a hanging jury — a "tribunal organized to return a verdict of death."[134] *Morgan* ensures that the decision of whether another human being should live or die will not be made by persons who are incapable of following the law. The result should be more fairness in capital cases.

Jaye Mendros

133. *Current Cases and Issues*, CAPITAL CONCERNS (Ky. Capital Litig. Resource Ctr., Frankfort, Ky.), July 1992, at 2, 6 (on file with the *Oklahoma Law Review*).

134. Witherspoon v. Illinois, 391 U.S. 510, 521 (1968).