Morgan v. Illinois: An Attempt to Provide Equality in the Selection of Capital Sentencing Jurors

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MORGAN v. ILLINOIS: AN ATTEMPT TO PROVIDE EQUALITY IN THE SELECTION OF CAPITAL SENTENCING JURORS

I. Introduction

Fundamental to the American criminal justice system is the principle that a criminal defendant has the right to be tried by a jury of his or her peers.1 This principle is most critical when a criminal defendant stands accused of a capital crime.2 To protect capital defendants, many states have instituted a two-phase criminal jury system: first, a trial judge instructs the jury to determine the defendant's guilt or innocence; and second, if the jury finds the defendant guilty, a trial judge instructs the same jury to consider aggravating and mitigating factors to determine the appropriate sentence.3 In the sentencing phase, therefore, a

1. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 149, reh'g denied, 392 U.S. 947 (1968). In Duncan, the United States Supreme Court recognized that a criminal defendant charged with a serious crime has a fundamental right to request a jury trial. Id. Although it is conceivable to imagine a fair system without the jury option, the Court stated that "no American State has undertaken to construct such a system." Id. at 150 n.14. Rather, the Court recognized that the right to a jury trial is so fundamental to our system that "every American State . . . uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict." Id.

Historically, the jury trial can be traced back several centuries before America was founded. Id. at 151. Scholar Robert Lloyd Raskopf has noted that "[s]ince its inception in England in the era before the Norman conquest, the jury has played a central role in justice, politics, and government." Robert Lloyd Raskopf, A First Amendment Right of Access to a Juror's Identity: Toward a Fuller Understanding of the Jury's Deliberative Process, 17 PEPP. L. REv. 357, 357-58 (1990). Raskopf has indicated further that the jury's historical role as the safeguard of criminal defendants' rights against "ruthless prosecutor[s]" and "corrupt judge[s]" is legendary. Id.

The protection against arbitrary rule by sovereign powers was the major objective in the creation of the Bill of Rights of 1789, which recognized trial by jury in America. Duncan, 391 U.S. at 151. For a further discussion of the historical right to a jury trial particularly in a capital sentencing case, see Mark S. Brodin, Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict, 59 U. Cin. L. Rev. 15, 15 (1990) (noting that jury is part of national folklore protecting accused from arbitrary law enforcement and biased judiciary) and John W. Poulos, Liability Rules, Sentencing Factors, and the Sixth Amendment Right to a Jury Trial: A Preliminary Inquiry, 44 U. MIAMI L. REV. 643, 660-63 (1990) ("[T]he right to a jury trial removes from the government's arsenal the awesome power to directly impose the criminal sanction on any citizen.").


3. See, e.g., ALA. CODE § 13A-5-46(b) (1982) ("If the defendant was tried and convicted by a jury, the sentencing hearing shall be conducted before the
juror must consider factors beyond guilt to determine whether a capital defendant should receive a sentence of death or life imprisonment. The most pertinent aspect of this two-phase criminal trial is the court's ability to determine whether a juror will impartially consider all of the evidence presented. The Sixth Amendment of the United States guarantees that a capital defendant has the right to a jury trial, and this right extends to the sentencing phase of a capital case. If the court determines that a juror cannot impartially consider the evidence, the court may excuse the juror or, in some cases, conduct the sentencing hearing without the juror's participation.

Other states leave the sentencing decision to the trial judge. See, e.g., ARIZ. REV. STAT. ANN. § 13-703B (1989) ("When a defendant is found guilty of or pleads guilty to first degree murder . . . the judge who presided at the trial . . . shall conduct a separate sentencing hearing . . . [and] [t]he hearing shall be conducted before the court alone."); IDAHO CODE §§ 19-2515(d)-(f) (1987) ("In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing . . . and the jury shall retire to . . . recommend a sentence . . . "); MONT. CODE ANN. § 46-18-301 (1993) ("When a defendant is found guilty of or pleads guilty to an offense for which the sentence of death may be imposed, the judge who presided at the trial . . . shall conduct a separate sentencing hearing . . . [which] shall be conducted before the court alone.").

One commentator has provided a compilation of the sentencing procedures of all 36 states that permit the death penalty. See Seltzer et al., supra note 2, at 572 n.5. For a further discussion of which states permit the death penalty, see infra note 66.

4. See, e.g., Ala. CODE §§ 13A-5-45(f)-(g) (1982) (providing that court must find at least one aggravating factor and no mitigating factors to impose death); Del. CODE ANN. tit. 11, §§ 4209(d)(1)(a)-(b) (1987) (providing that death penalty shall not be imposed unless aggravating factor exists and no sufficiently mitigating evidence exists); Ill. ANN. STAT. ch. 38, para. 9-1(c) (Smith-Hurd Supp. 1992) (providing that court shall instruct jury to consider any aggravating or mitigating factors in determining appropriate sentence); Ky. REV. STAT. ANN. § 532.025(2) (Michie/Bobbs-Merrill 1990) (providing that jury shall hear mitigating and aggravating evidence to determine appropriate sentence); Miss. CODE ANN. §§ 99-19-101(3)(a)-(c) (1993) (providing that jury must determine that aggravating circumstances exist and no sufficient mitigating circumstances exist in order to impose death penalty).

5. See, e.g., Marshall Dayan et al., Searching For an Impartial Sentencer Through Jury Selection in Capital Trials, 23 Loy. L.A. L. Rev. 151, 151 (1989). Scholar Dayan has noted that "jury selection is perhaps the most important stage of any trial . . . ." Id. Specifically, to meet constitutional mandates, a juror must be
Constitution requires that a defendant charged with a serious crime have the opportunity to be tried by an impartial jury of his or her peers.6 State criminal defendants also are guaranteed this right of impartiality because the Sixth Amendment is applied to state criminal proceedings through the Fourteenth Amendment.7

To ensure that a defendant receives his or her Sixth Amendment right to an impartial jury, the prosecution, the defense and the trial judge participate in the process of voir dire.8 Voir dire enables a trial judge to question potential jurors to determine whether a particular juror's views would inhibit his or her ability to apply the law.9 During voir
dimpar bias in both the guilt and sentencing phase of the trial. Id. at 152. Dayan has recognized further that the defense counsel's task of empaneling an impartial jury in a capital case is extremely difficult because defendants are often accused of extremely brutal and revolting crimes. Id. at 151 (noting brutality of crime and overwhelming societal support for death penalty make empaneling impartial jury "difficult, if not impossible").

6. U.S. CONST. amend. VI. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Id. In Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991), Justice Kennedy opined that "[i]f any, interests under the constitution are more fundamental than the right to a fair trial by impartial jurors." Id. at 2745. Determining how to protect this interest, however, is often difficult because it requires that defense counsel assess a prospective jurors' beliefs and biases, and these biases are often unarticulated or hidden.

Scholar Dayan has suggested several guidelines for selecting an impartial capital sentencing jury. Dayan et al., supra note 5, at 152. For example, Dayan has asserted that a juror may not be impartial if he or she harbors misconceptions concerning the ability of life sentenced inmates to receive parole because his or her belief may alter the determination of an appropriate sentence. Id. at 175-76. Dayan has also suggested that counsel should inform jurors as to the effect of their decision to impose a life sentence—for example, whether defendant would ever be eligible for parole. Id. at 175. Additionally, Dayan has asserted that "a capital defendant may not be sentenced to death by persons unable to conscientiously consider mitigating evidence 'stemming from the diverse frailties of humankind' offered by the defendant as a reason not to sentence him to death." Id. at 176 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

7. U.S. CONST. amend. XIV. The Fourteenth Amendment provides, in pertinent part, that "[n]o State... shall deprive any person of life, liberty, or property without due process of law." Id. For a discussion of the Sixth Amendment's application to state proceedings through the Fourteenth Amendment, see infra notes 31-51 and accompanying text.

8. See Raskopf, supra note 1, at 357 (noting that jury's role is to protect defendant against "wrath of ruthless prosecutor and the tyranny of the corrupt judge"). Arguably, any attempts by a judge or prosecutor to eliminate impartial jurors through manipulation of the voir dire process would directly contravene the historical purpose of the American jury system to protect defendants and to reinforce the democratic political framework. Id. In fact, Justice Blackmun, joined by Justices Brennan and Stevens, asserted that "[t]he constitutional right to an impartial jury is so basic to a fair trial that its infraction can never be treated as harmless error." Gray v. Mississippi, 481 U.S. 648, 649 (1986).

dire, counsel may request that a trial judge question a potential juror about his or her views on such subjects as racial prejudice and capital punishment.\(^\text{10}\) Depending on a juror's responses to the questions posed, he or she will be accepted, challenged for cause and excused, or dismissed from serving as a juror in the case by the prosecution or defense's peremptory challenge.\(^\text{11}\) A trial judge often will excuse a juror

amination of venireman, or prospective jurors”). Traditionally, the trial judge rather than the prosecutor or the defense counsel conducts the voir dire of potential jurors. \(^\text{Id.}\); see also People v. Gacy, 468 N.E.2d 1171, 1184-85 (Ill. 1984) (indicating that trial judge conducts voir dire of potential jurors), cert. denied, 470 U.S. 1037 (1985). Obermaier has suggested that it is anomalous for the trial judge to conduct voir dire because, in actuality, he or she knows very little about the case at hand. See Obermaier, \(^\text{supra}\), at 151. But see Michael T. Nietzel & Ronald C. Dillehay, The Effects of Variations in Voir Dire Procedures in Capital Murder Trials, 6 LAW & HUM. BEHAV. 1, 3 (1982) (maintaining that attorney conducted voir dire in state courts is gradually eroding due to judiciary and bar criticisms that it is “inefficient, time-consuming, and sometimes improper”) (citing People v. Crowe, 506 P.2d 193, 199-200 (Cal. 1973)). Nonetheless, statistics show that even in jurisdictions that permit the lawyers to conduct voir dire—New York, Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida—the majority of those jurisdictions still conduct voir dire without much emphasis on lawyer participation. \(^\text{Id.}\)

One advantage to judge conducted voir dire is that the judge theoretically has no interest in the outcome of the case, and therefore, is more likely to pose questions that would benefit both the prosecution and the defense in their attempt to empanel impartial jurors. However, as Obermaier has suggested, knowing little about the case at hand may hamper the trial judge’s ability to sufficiently question potential jurors. Obermaier, \(^\text{supra}\), at 151. Because the trial judge is not aware of the specific nuances of the case, the judge cannot be fully expected to ask questions that would uncover potential relevant biases that may affect a juror’s deliberations. \(^\text{Id.}\)

If voir dire is a protective device, the court must permit liberal questioning by either the trial judge or the attorneys so that each individual defendant is guaranteed a truly impartial jury. Dayan et al., \(^\text{supra}\) note 5, at 165 (asserting that “counsel should be accorded wide latitude in examining prospective jurors especially in capital cases”). This liberal questioning, particularly when it is done by attorneys, may, as Nietzel has suggested, be “time-consuming” and sometimes “inefficient,” but it is the best procedure to ensure an impartial jury. See Nietzel & Dillehay, \(^\text{supra}\), at 3.

The Federal Rules of Criminal Procedure authorize the federal district courts to conduct voir dire and permit attorneys either to supplement these questions directly, or more commonly, to submit a list of supplementary questions for the federal judge to pose to the prospective panel of jurors. Fed. R. CRIM. P. 24(a). For a further discussion of variations in the voir dire process, see Nietzel & Dillehay, \(^\text{supra}\), at 2.

10. See, e.g., Aldridge v. United States, 283 U.S. 308 (1931). The Supreme Court in Aldridge permitted defense counsel to question potential jurors concerning racial prejudice to determine impartiality. \(^\text{Id.}\) at 314-15. For a discussion of the facts and significance of the Aldridge decision, see infra notes 59-65 and accompanying text. For a discussion of the ability of defense counsel to inquire into a juror’s views on capital punishment, see infra notes 66-130 and accompanying text.

based on the fact that the juror's views are incompatible with the mandates of the law.\textsuperscript{12} For example, to protect a defendant's Sixth Amend-

\textsuperscript{12} See, e.g., Seltzer et al., \textit{supra} note 2, at 574. In a capital trial, the trial court questions a juror about his or her attitudes toward the death penalty and his or her ability to impose the death penalty, if warranted. \textit{Id.} at 574. In a capital trial, this process is called "death qualification," indicating that a juror is only qualified if his or her answers to the questions posed establish an ability to consider the death penalty as an appropriate punishment. \textit{Id.} If a juror evinces an inability even to consider the death penalty, the trial court must exclude that juror for cause from both the guilt and the sentencing phases of the trial. \textit{Id.}

Death qualification is controversial because it results in the removal of potential capital jurors solely because they refuse to impose the death penalty. \textit{See} William C. Thompson, \textit{Death Qualification After Wainwright v. Witt and Lockhart v. McCree}, 13 \textit{Law & Hum. Behav.} 185, 185 (1989). Thompson has noted that jurors excluded by this process are qualified to decide guilt and innocence; they are only unsuitable for the sentencing phase. \textit{Id.} Thus, in capital trials, a criminal defendant's guilt or innocence is decided "exclusively by jurors who have stated a willingness to impose a death sentence." \textit{Id.} Many critics suggest that death qualified jurors are conviction prone. \textit{Id.; Seltzer et al., \textit{supra} note 2, at 573 (stating that "death qualification process produces a jury that is biased in favor of the prosecution, unduly prone to convict on the issue of guilt or innocence, and underrepresentative of the community in which it is drawn"); see also James Luginbuhl & Kathi Middendorf, \textit{Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials}, 12 \textit{Law & Hum. Behav.} 263, 276 (1988) (arguing that death qualified jurors are more "authoritarian and punitive," and as a result "these [findings] suggest that death-qualified jurors would be more conviction prone than death-scrupled jurors"). But see Witherspoon v. Illinois, 391 U.S. 510, \textit{reh'g denied}, 393 U.S. 898 (1968). In \textit{Witherspoon}, the United States Supreme Court held that insufficient scientific evidence existed to conclude that exclusion of jurors opposed to capital punishment would "substantially increase[] the risk of conviction." \textit{Id.} at 518. In \textit{Witherspoon}, a death qualified jury sentenced the defendant to death, and on appeal, the defendant cited two surveys that concluded that a death qualified juror is more conviction prone than a juror on which objectors to the death penalty are empaneled. \textit{Id.} at 517 n.10. The Court held that the data was "too tentative and fragmentary" to establish that death qualified jurors were conviction prone. \textit{Id.}

Eighteen years later, the Supreme Court expressly reaffirmed its rejection of the studies produced in \textit{Witherspoon}. Lockhart v. McCree, 476 U.S. 162, 170 (1986). In \textit{Lockhart}, the Court stated: "It goes almost without saying that if these studies were 'too tentative and fragmentary' to make out a claim of constitutional error in 1968, the same studies, unchanged but for having aged some 18 years, are still insufficient to make out such a claim in this case." \textit{Id.; see also Joan B. Foley, Comment, \textit{Death Qualification: Are Capital Defendants Entitled to Acquittal-Prone Juries? An Argument in Support of the Status Quo}, 30 St. Louis U. L.J. 193, 225
ment right to an impartial jury, a trial judge must excuse a juror who indicates during voir dire that he or she is unable to remain impartial.13

A commonly appealed issue in capital cases is the trial court’s refusal to permit defense counsel to determine a juror’s views on capital punishment during voir dire.14 Convicted defendants often will allege that such refusal allowed individuals who were biased in favor of the death penalty to serve as members of the jury, thus violating the defendant’s Sixth Amendment right to an impartial jury.15 State courts had vacillated between whether this refusal did, in fact, constitute a Sixth Amendment violation.16 Morgan v. Illinois,17 a 1992 Supreme Court de-

(1985) (concluding that death qualification does not result in guilt prone or underrepresentative jury).

For an in-depth discussion of the various types of studies undertaken to determine whether death qualification led to conviction prone juries and several courts criticisms of those studies, see Thompson, supra, at 191-95 (examining courts repeated criticisms of empirical studies on death qualification) and Seltzer et al., supra note 2 at 576-81 (examining sophistication and results of twelve studies concluding that death qualification leads to conviction prone juries).

13. Duncan v. Louisiana, 391 U.S. 145, 150, reh’g denied, 392 U.S. 947 (1968) (stating that defendant has right to trial by jury); Irvin v. Dowd, 366 U.S. 717, 728 (1961) (stating that juror must be impartial). For a discussion of the requirement that a juror in a criminal trial be impartial, see infra notes 31-51 and accompanying text.


15. See, e.g., Skipper, 364 S.E.2d at 899. In Skipper, the trial court had refused to permit questioning of prospective jurors regarding their ability to consider punishments other than death if the defendant was convicted. Id. The trial court stated that “no question’s [sic] proper to ask a juror touching his feelings on the imposition of the death penalty.” Id. The Supreme Court of Georgia rejected the trial court’s reasoning, holding that:

"[A] criminal defendant is entitled to an impartial jury by the Sixth Amendment to the U.S. Constitution. A juror who has made up his mind prior to trial that he will not weigh evidence in mitigation is not impartial . . . ." In other words, “an inability to fairly consider a life sentence is just as disqualifying as an inability to consider a death sentence.”

Id. (quoting Childs v. State, 357 S.E.2d 48, 48 (Ga. 1987)).

16. For a discussion of the varying approaches taken by state courts, see infra notes 105-28 and accompanying text.

17. 112 S. Ct. 2222 (1992). For an in-depth discussion of the Morgan decision, see infra notes 131-218 and accompanying text.
In Morgan, the state charged the defendant Derrick Morgan with first-degree murder. Subsequent to conviction, the trial court instructed the same jury to consider both aggravating and mitigating factors to determine an appropriate sentence. The jury returned a death sentence. On appeal, the defendant alleged that the trial court’s refusal to ask jurors if they would automatically impose a death sentence upon conviction violated his right to an impartial jury. In a 6-3 decision, the United States Supreme Court held that the trial court had violated the defendant’s right to an impartial jury. The Court opined that the trial court’s refusal effectively denied the defendant an opportunity to determine whether a juror’s partiality toward the death penalty mandate.

After the prosecution has presented evidence of aggravating factors, the defense has the opportunity to present mitigating factors that would support rendering a life sentence rather than a death sentence. Although the Illinois statute lists several mitigating factors, the statute indicates that these factors are not exclusive and that the defense may present other evidence of mitigation, if relevant. Examples of mitigating factors include lack of a prior criminal record, evidence that the defendant was under extreme mental or emotional disturbance, and evidence that the defendant acted under threat of imminent infliction of death or great bodily harm.

The Supreme Court also has helped to define what mitigating factors a jury may consider. In Lockett v. Ohio, 438 U.S. 586 (1978), the Supreme Court stated that a jury may consider the defendant’s character and record, as well as the circumstances surrounding the commission of the crime. For a detailed discussion of the role of aggravating factors in both the guilt and sentencing phase of a trial, see Poulos, supra note 1, at 665. Poulos has indicated that aggravating factors “function to create liability for the death penalty” because a jury may not impose the death penalty unless it determines that an aggravating factor indeed exists.

The Sixth Amendment guarantees that “[i]n 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). For a discussion of the Sixth Amendment’s applicability to a state criminal proceeding, see infra notes 31-51 and accompanying text.
dated excusal for cause. To ensure impartiality, the Morgan Court articulated a bright line rule for capital cases: pursuant to defense counsel's request, a capital trial judge must ask prospective jurors if their views would compel them automatically to impose the death penalty upon conviction. In so holding, the Court emphasized the critical role that voir dire plays in ensuring that a criminal defendant receives his or her right to an impartial jury.

Section II of this Note addresses the Sixth Amendment guarantee of an impartial jury. Subsequently, this section addresses the voir dire process in a capital trial, focusing on the different approaches state courts have taken to ensure that a defendant receives a fair and impartial hearing. Section III of this Note analyzes the Morgan majority's strict interpretation of the Sixth Amendment impartiality requirement. Section IV of this Note concludes that the Morgan holding properly grants a criminal defendant the opportunity to exclude prospective jurors who are partial. This Note further concludes that the effect of Morgan is to put the state and the defendant on almost equal footing by ensuring an impartial hearing for both litigants.

II. BACKGROUND

A. The Sixth Amendment's Application to State Criminal Proceedings

The Sixth Amendment of the United States Constitution provides that a criminal defendant has the right to be tried by an impartial jury of his or her peers. Originally, the Sixth Amendment applied only to

23. Morgan, 112 S. Ct. at 2229.
24. Id. at 2230. The Court held that “[i]f even one such juror [who would automatically impose the death penalty] is empaneled and the death sentence is imposed, the state is disentitled to execute the sentence.” Id.
25. Id. at 2228. For a discussion of the Morgan Court's treatment of the defendant's constitutional right to an impartial jury, see infra notes 142-57 and accompanying text.
26. For a discussion of the constitutional guarantees afforded to a criminal defendant under the Sixth Amendment and applied to the states through the Fourteenth Amendment, see infra notes 31-51 and accompanying text.
27. For a discussion of the voir dire process in a capital trial and the different approaches that state courts have taken to ensure that a defendant receives a fair and impartial hearing, see infra notes 105-28 and accompanying text.
28. For a discussion of the majority's strict adherence to the impartiality requirement of the Sixth Amendment, see infra notes 142-46 and accompanying text.
29. For a discussion of this Note's conclusion that the Morgan holding rightfully grants a criminal defendant the opportunity to exclude jurors who are not impartial, see infra notes 177-204 and accompanying text.
30. For a discussion of this Note's conclusion that the Morgan decision puts the state and the defendant on an almost equal footing and ensures impartiality, see infra notes 177-204 and accompanying text.
31. U.S. Const. amend. VI.
proceedings in federal court. However, by the mid-Twentieth Century, the Sixth Amendment applied to state criminal cases through the Fourteenth Amendment. Two Supreme Court cases, *Duncan v. Louisiana* and *Irvin v. Dowd*, established the now universal proposition that a state criminal defendant is entitled to the same rights as a defendant tried in a federal court.

In *Duncan*, the Supreme Court faced the novel issue of whether a state criminal defendant had a constitutional right to a jury trial. The Supreme Court held that the Sixth Amendment's guarantee of a trial by jury should apply to state criminal proceedings through the Fourteenth Amendment.

Prior to the *Duncan* decision, those states that did permit a state criminal defendant to have a jury had to ensure juror impartiality. See Dayan et al., *supra* note 5, at 152 ("[E]ven before the guarantees of the Sixth Amendment were incorporated to govern state prosecutions, the Due Process Clause was held to require an impartial jury in a state criminal prosecution.").

32. See, e.g., Carlson v. Landon, 342 U.S. 524, 556 (1952) (stating that obvious design of Bill of Rights was to protect individuals from governmental oppression and to guarantee Americans greater freedom than that of their ancestors in Europe). The Framers originally added the Bill of Rights to the Constitution to protect the federal government from infringing upon the rights of American citizens. See Kermit L. Hall et al., *American Legal History Cases and Materials* 93 (1991). Historians have noted that the Anti-Federalists objected to the Constitution because it contained few guarantees for personal liberty from federal oppression. Id. In order to ensure ratification of the Constitution, the Federalists had to promise the proposal of amendments—the Bill of Rights—to the original constitution. Id. Early in American history, the threat of the federal government usurping power from the states and American citizens was imminently more feared than the threat of the states infringing on individual rights. Id. America had recently broken away from an English monarchy that, like a national government, had limited individual's sovereignty. Id. Thus, it is not surprising that the Bill of Rights, as originally contemplated, did not apply to the states. See id.


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Amendment. The Court reasoned that a state criminal defendant charged with a serious crime has a fundamental right embodied in the "American scheme of justice" to a trial by jury. The Court stated that in order to determine the seriousness of a crime, a court must look to the potential penalties for the crime, most notably, whether a prison term was available. In Duncan, the Court held that a sixty-day prison term was sufficiently serious to warrant the application of the Sixth Amendment protection of trial by jury to a state criminal proceeding. Notably, this decision furthered the historical policy of protecting individuals from state oppression by requiring a jury of the defendant's peers to determine his or her guilt.

While the Duncan Court held that state criminal defendants are entitled to a jury trial, it failed to define the requisite qualifications of a prospective juror. The 1961 United States Supreme Court decision in

38. Id. at 149. The Fourteenth Amendment provides, in pertinent part, that "[n]o State... shall deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV. The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment includes many of the rights guaranteed by the first eight Amendments to the Constitution. Duncan, 391 U.S. at 148. For a discussion of the Court's application of many of the rights found in the Bill of Rights to state courts through the Fourteenth Amendment, see supra note 33.


40. Id. at 161-62. To reach this conclusion, the Court relied on one of its previous decisions that had counseled that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment." Id. at 159 (citing District of Columbia v. Clawans, 300 U.S. 617 (1937)).

41. Id. at 146. The trial court convicted the defendant of simple battery, sentenced him to a sixty day prison term and fined him $150.00. Id.

42. Id. at 156. The Court stated:

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge.

Id.

Commentators and historians on the subject of trial by jury have recognized that a trial by jury protects defendants from state oppression. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349 (Cooley ed. 1899) (commenting that jury trial provides barrier between individual liberty and prerogative of crown); Poulos, supra note 1, at 660 (stating that jury trial removes power to impose criminal sanctions from government and places it in "an ad hoc body of citizens who are bound only to the law and to the search for truth").

43. Duncan, 391 U.S. at 157-58.
Irvin v. Dowd\(^{44}\) complemented the Duncan decision, holding that the Due Process Clause of the Fourteenth Amendment mandated that any jury empaneled in a state court must be impartial.\(^{45}\) In Irvin, three-fourths of the jury empaneled to hear the defendant's case had admitted during voir dire that they believed that the defendant was guilty.\(^{46}\) These admissions revealed the jurors' partiality.\(^{47}\) Accordingly, the Court vacated the sentencing judgment as violative of the defendant's due process rights.\(^{48}\)

Until Duncan and Irvin, the Supreme Court had failed to recognize the constitutional guarantee of a trial by an impartial jury.\(^{49}\) Though a rather recent concept, the courts now embrace this protection as "fundamental" to the American criminal justice system.\(^{50}\) This protection, however, has posed serious problems for trial courts seeking to find the elusive answers to the questions of who is an impartial juror and how to determine this impartiality.\(^{51}\)

45. Id. Tracing the origin of the right to trial by jury, the Court stated "[i]n essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." Id.
46. Id. at 729.
47. Id. at 727. In Irvin, the petitioner was accused of six highly publicized murders. Id. Of the twelve jurors who ultimately were empaneled, eight admitted during voir dire that they believed the defendant was guilty. Id. Despite the jurors' admissions, the trial court refused to grant a change of venue to eliminate such bias. Id. The Supreme Court subsequently vacated the judgment and remanded the case for retrial by a fair jury. Id. at 729.
48. Id. at 722.
50. See Seltzer et al., supra note 2, at 572 ("It is constitutionally required that a jury empaneled to sit on a capital case be both fair and impartial.").
51. See, e.g., Ross v. Oklahoma, 487 U.S. 81, reh'g denied, 487 U.S. 1250 (1988) (finding that failure of trial court to remove biased juror where defendant exercised peremptory challenge did not violate defendant's Sixth Amendment right to impartial jury); Ham v. South Carolina, 409 U.S. 524 (1973) (finding that failure of trial court to ask questions concerning jurors' racial prejudice denied defendant fair trial under Fourteenth Amendment); Turner v. Louisiana, 379 U.S. 466 (1965) (finding that trial court denied defendant impartial jury where key witnesses had repeated contact with jurors); Irvin v. Dowd, 366 U.S. 717 (1961) (finding that failure to grant change of venue violated defendant's right to impartial jury where eight empaneled jurors admitted belief that defendant was guilty); Groppi v. Wisconsin, 400 U.S. 133 (1955) (finding that trial court's refusal to grant change of venue in misdemeanor trial violated defendant's right to impartial jury); State v. Williams, 550 A.2d 1172 (N.J. 1988) (finding that trial court's failure to ask whether juror would automatically impose death penalty violated defendant's right to impartial jury); Skipper v. State, 364 S.E.2d 835 (Ga. 1988) (finding that trial court's limitation on voir dire questioning deprived defendant of opportunity to determine juror's impartiality).

For a further discussion of the serious problems trial courts face when attempting to determine who is an impartial juror and to how define this impartiality, see infra notes 66-128 and accompanying text.
B. Voir Dire As a Means To Determine Impartiality

The most critical moments in a criminal trial often occur before the presentation of opening arguments.52 For example, the voir dire procedure, which precedes trial, serves the paramount function of empaneling a fair and impartial jury as required by the Sixth and Fourteenth Amendments.53

The definition of “voir dire” helps to illustrate its purpose in the criminal justice system. Its translation is: “to speak the truth.”54 Through tailored voir dire questioning, judges and trial lawyers attempt to persuade prospective jurors to “speak the truth” when answering the trial judge’s questions.55 Voir dire enhances both a trial judge’s and a lawyer’s ability to ascertain the impartiality of a particular juror.56

Trial judges and lawyers have historically utilized voir dire to determine a juror’s impartiality concerning specific social issues.57 For example, trial judges and lawyers use voir dire to determine whether a potential juror possesses any racial prejudice that would influence his or her decision to convict.58 In Aldridge v. United States, 59 the Supreme Court addressed the propriety of such questioning in a capital case.60 In Aldridge, the defendant was an African-American who had been accused of killing a caucasian police officer.61 The Court held that the defense

52. See, e.g., Dayan et al., supra note 5, at 151. Dayan has asserted that jury selection is the most important stage of any trial, especially where the jury will have to decide whether the state should impose the death penalty. Id.

53. For a discussion of the procedure of voir dire and its potential over-reaching effect in a capital trial, see supra notes 8-13 and accompanying text.

54. See Obermaier, supra note 9, at 151. Obermaier has indicated that the term “voir dire” has come to signify “the preliminary examination of someone asked to be a witness or a juror.” Id. It is important to distinguish between voir dire of a potential juror and voir dire of a potential witness. Id. For example, trial lawyers traditionally conduct the voir dire of witnesses. Id. In contrast, the trial judge, with some assistance by the trial lawyers, generally conducts the voir dire of prospective jurors. Id. For a discussion of the voir dire procedure in a capital trial, see supra notes 8-13 and accompanying text.

55. For a discussion of the use of voir dire to determine a potential juror’s beliefs, see Obermaier, supra note 9, at 151.

56. Id. An effective voir dire enables counsel on both sides to effectively challenge for cause those jurors who show an actual or implied bias against their client. See Howeth, Note, supra note 11, at 579-81 (explaining counsel’s challenge for cause and use of peremptory challenge to ensure jury impartiality).

57. For a detailed discussion of the use of voir dire to determine impartiality, see infra notes 58-128 and accompanying text.


59. Id.

60. Id. at 310. Defense counsel raised the issue of juror impartiality. Id. The defense counsel stated that “[a]t the last trial of this case I understand there was one woman on the jury who was a southerner, and who said that the fact that the defendant was a negro and the deceased a white man perhaps somewhat influenced her.” Id. Despite defense counsel’s request, the trial judge refused to question jurors about their racial prejudice. Id.

61. Id. at 309.
counselor had a right to request that the trial judge voir dire jurors to determine racial animus.62 The Court reasoned that the trial judge should have allowed the question because no harm could have resulted from the question and a great benefit—protecting the defendant’s constitutional rights—could have resulted.63 By permitting inquiry concerning racial prejudice, the Court mandated that trial courts were to err on the side of protecting the defendant’s constitutional right to an impartial jury.64 The Aldridge decision is significant today because it set

62. Id. at 314. The Court indicated that such inquiry was appropriate when the defendant was accused of an offense against a victim of a race other than his own. Id.

63. The Aldridge Court defined the issue as follows:

The question is not as to ... civil privileges ... but as to the bias of the particular jurors who are to try the accused. If in fact, sharing the general sentiment, they were found to be impartial, no harm would be done in permitting the question [as to racial prejudice]; but if any one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit .... [W]e do not think that it can be said that the possibility of such prejudice is so remote as to justify the risk in forbidding this inquiry. And this risk becomes most grave when the issue is life or death.

64. Id. The Court considered it of paramount importance that the risk of failing to ask the question significantly outweighed the harm in permitting the question to be asked because the defendant was on trial for his life. Id.

In contrast, in Ristaino v. Ross, 424 U.S. 589 (1976), the Supreme Court held that failure to conduct voir dire regarding racial prejudice was not per se a violation of defendant’s constitutional rights. Id. at 598. In Ristaino, the defendant was charged with armed robbery and with assault and battery with intent to murder. Id. at 590. The trial court convicted defendant of all counts. Id. at 595.

On writ of certiorari, the Supreme Court addressed two issues: first, whether the respondent was entitled to require a question to be directed specifically at a juror concerning his or her racial prejudice; and second, whether the trial court must always ask such a question where a trial involves a defendant of one race and a victim of another. Id. at 590. The Court answered both these issues in the negative. Id.

The Ristaino Court may have been influenced by the fact that the case did not involve the death penalty. The Court stated: "We do not agree ... that the need to question veniremen specifically about racial prejudice also rose to constitutional dimensions in this case." Id. at 597. The Ristaino Court held that the recent decision in Ham v. South Carolina, 409 U.S. 524 (1973), which required questioning jurors concerning their racial prejudices, merely "reflected an assessment of whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as 'indifferent as [they stand] unsworne.'" Ristaino, 424 U.S. at 596 (quoting Coke on Littleton 144b (19th ed. 1832)).

The significance of the Ristaino decision lies not only in the Court’s refusal to mandate a constitutional guarantee of questioning potential jurors concerning their racial prejudice, but also in the judicial deference granted to the trial judge. Id. The Court stated that the trial court must make an “assessment” of “all the circumstances presented” to determine whether a juror would be “indifferent as [he] stands unsworne.” Id. This subjective assessment has remained the standard in all appeals raising the issue of bias where the trial judge has refused to question jurors as to their personal views. See State v. Atkins, 399
precedent for permitting the questioning of jurors about their individual biases to determine impartiality.\textsuperscript{65}

C. The Quest for Impartiality in a Capital Sentencing Hearing

Juror bias is not only at issue where race is concerned, but also in capital cases because of the severity of the possible punishment and because of increasing support for the death penalty.\textsuperscript{66} In capital cases, both the defense and the prosecution have a strong interest in obtaining an impartial jury.\textsuperscript{67} Frequently, because the defendant has the most at

S.E.2d 760, 765 (S.C. 1990) ("The determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and is not reviewable on appeal unless wholly unsupported by the evidence." (quoting State v. Plemmons, 332 S.E.2d 765, 769 (S.C. 1985), vacated on other grounds, 476 U.S. 1102 (1986), and overruled on other grounds by State v. Torrence, 406 S.E.2d 315 (1988)).

For a further discussion of the effects and problems posed by the great latitude and judicial deference accorded trial judges, see infra notes 87-92 and accompanying text.

65. Aldridge, 283 U.S. at 314. In a footnote, the Court noted that: "[p]rejudice being a state of mind more frequently founded in passion than in reason, may exist with or without cause; and to ask a person whether he is prejudiced or not against a party, and (if the answer is affirmative), whether that prejudice is of such a character as would lead him to deny the party a fair trial, is not only the simplest method of ascertaining the state of his mind, but is, probably, the only sure method of fathoming his thoughts and feelings."

Id. at 313-14 n.3 (quoting People v. Reyes, 5 Cal. 347, 350 (1855)).

66. See Seltzer et al., supra note 2, at 571-72. Seltzer has noted that capital punishment has become a "routine" sanction imposed in the American criminal justice system. Id. There are currently 36 states that permit capital punishment, and since 1976, 85 men and one woman have been executed. Id. (citing NAACP LEGAL DEFENSE AND EDUCATION FUND, INC. DEATH ROW, U.S.A. (AUGUST, 1986)).


67. Dayan et al., supra note 5, at 151. Scholar Dayan has noted that capital
stake—his or her life—defense counsel is more aggressively litigating and appealing alleged mistakes in voir dire. This aggressive litigation by defense counsel has led to a plethora of appellate capital cases alleging constitutionally insufficient voir dire.

1. Witherspoon v. Illinois and Its Progeny

In Witherspoon v. Illinois, the Supreme Court defined the extent to which a prosecutor may excuse for cause a juror who is allegedly partial to the defense. In Witherspoon, the trial court had excused all jurors who expressed “conscientious or religious scruples” against capital punishment, as well as all jurors who opposed capital punishment in principle. On appeal, the United States Supreme Court balanced the defendant’s interest in an impartial jury against the prosecution’s interest in securing a capital sentence. After balancing these competing
cases often involve heinous crimes where the “defendant’s guilt is virtually unassailable.” The function of the jury in this instance is to recommend the appropriate sentence. In these instances, defense lawyers have the difficult task of selecting “qualified and competent jurors who are [nevertheless] willing to sentence their clients to death.”

68. For a discussion of several cases appealed due to alleged mistakes in voir dire, see infra notes 70-124 and accompanying text.

69. See, e.g., People v. Jackson, 582 N.E.2d 125, 156 (Ill. 1991) (affirming defendant’s sentence and rejecting argument that voir dire deprived defendant of constitutional right to impartial jury); People v. Gallego, 802 P.2d 169, 210-11 (Cal. 1990) (affirming sentence and rejecting argument that trial court violated defendant’s constitutional right to impartial jury by denying defendant’s challenges for cause of two jurors); Riley v. State, 585 A.2d 719, 725-26 (Del. Super. Ct. 1990) (affirming defendant’s sentence and refusing to recognize constitutional necessity of posing “reverse-Witherspoon inquiry”), cert. denied, 111 S. Ct. 2840 (1991), and abrogated by Morgan v. Illinois, 112 S. Ct. 2222 (1992); State v. Atkins, 399 S.E.2d 760, 765 (S.C. 1990) (affirming defendant’s sentence and rejecting claim that four jurors were predisposed to impose death penalty); Morris v. Commonwealth, 766 S.W.2d 58, 60 (Ky. 1989) (reversing sentence and accepting defendant’s argument that voir dire violated his right to impartial jury); State v. Williams, 550 A.2d 1172, 1179 (N.J. 1988) (reversing defendant’s sentence because trial court committed numerous errors including conducting inadequate voir dire); Skipper v. State, 364 S.E.2d 835, 839 (Ga. 1988) (reversing defendant’s sentence because voir dire violated defendant’s right to impartial jury).

70. 391 U.S. 510 (1968).

71. Id. at 514.

72. Id. at 515. In Witherspoon, the trial court excluded all veniremen who indicated that they had conscientious scruples against inflicting the death penalty. In fact, the trial judge initially remarked, “let’s get these conscientious objectors out of the way, without wasting any time on them.” Id. at 514. Only 5 of the 47 jurors, however, voiced an automatic inability to impose the death penalty upon conviction.

73. Id. at 518-19. The Court held that although the prosecution clearly has the right to exclude jurors who would never impose the death penalty, this right does not expand to exclude every juror who has some reservation against the death penalty. Id. at 519. One commentator has illustrated the conflict between the state’s interest in securing impartial jurors and the defendant’s right to an
interests, the Court determined that a juror who opposes the death penalty is still potentially able to follow the law and uphold his or her oath.\textsuperscript{74} Under the "\textit{Witherspoon} inquiry," therefore, the trial judge must exclude only those jurors who would refuse to vote for the death penalty without considering the evidence presented.\textsuperscript{75} The Court held that a trial judge must not exclude jurors who simply voiced general objections to the death penalty.\textsuperscript{76}

Twelve years later, the Supreme Court decided \textit{Adams v. Texas}.\textsuperscript{77} In \textit{Adams}, the Court rejected the trial court's exclusion of jurors who were unable to take an oath that "the mandatory penalty of death or imprisonment for life would not affect their deliberations on any issue of fact."\textsuperscript{78} The Supreme Court held that a trial judge must not exclude a juror un-

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\textsuperscript{74} \textit{Witherspoon}, 391 U.S. at 519. The Court stated "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." \textit{Id.}

\textsuperscript{75} \textit{Id.} The original intent of the \textit{Witherspoon} Court was to limit the prosecution's challenges for cause where the juror expressed hesitation against the imposition of the death penalty. \textit{Id.} at 520. Under \textit{Witherspoon}, a trial court could not exclude a juror simply because he or she did not champion the death penalty. \textit{Id.} However, subsequent cases have interpreted \textit{Witherspoon} as defining a bright-line rule for exclusion of prospective jurors: exclusion is warranted only where a prospective juror states in advance of trial that he or she automatically would oppose the death penalty. \textit{See, e.g.,} \textit{Adams v. Texas}, 448 U.S. 38 (1980). In \textit{Adams}, the Supreme Court struck down a Texas statute excluding jurors who could not take an oath that a mandatory sentence of death or life imprisonment would "not affect their deliberations on any issue of fact." \textit{Id.} at 42. For a further discussion of \textit{Adams}, and how its language unintentionally modified \textit{Witherspoon}, see \textit{infra} notes 77-92 and accompanying text.

\textsuperscript{76} Witherspoon, 391 U.S. at 522-23.

\textsuperscript{77} 448 U.S. 38 (1980).

\textsuperscript{78} \textit{Id.} at 42. The Texas Penal Code provides: Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact. \textit{Tex. Penal Code Ann.} § 12.31(b) (West 1974). \textit{Adams} found the Texas Penal Code unconstitutional as applied to the facts of that case. \textit{Adams}, 448 U.S. at 50. The Court held "the State may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths. But in the present case Texas has applied § 12.31(b) to exclude jurors whose only fault was to take their responsibilities with special seriousness as honestly that they might or might not be affected."
less a juror's views would "prevent or substantially impair the performance of his [or her] duties as a juror." Although the Adams Court may not have intended to narrow the Witherspoon holding, the Supreme Court subsequently noted that Adams had this precise effect.

In Wainwright v. Witt, the Supreme Court stated that Adams simplified the standard for exclusion.82 According to the Wainwright Court, Adams had rejected the argument that a trial judge could only exclude jurors who would never impose the death penalty.83 The Wainwright Court defined the standard for exclusion as follows: "The standard is whether a juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with the instructions and his oath."84 The Wainwright Court further stated that appellate courts should give great deference to a trial judge's decision on whether to exclude a juror because a finding of bias often results from mental impressions of a juror's credibility and demeanor that cannot be recreated on appeal.86

Ironically, the Wainwright Court created the very problem that Witherspoon sought to alleviate.87 Specifically, Witherspoon prohibited a

79. Adams, 448 U.S. at 45.
80. See Wainwright v. Witt, 469 U.S. 412 (1985). After Adams, prosecutors no longer had to establish that a juror would automatically, and under every circumstance, oppose capital punishment. Id. at 420-21. In Wainwright, the Supreme Court construed Adams as dispensing with the requirement that a "juror's bias be proved with unmistakable clarity." Id. at 424.
82. Id. at 421 (noting that Witherspoon standard "has been simplified").
83. Id. ("The tests with respect to sentencing and guilt . . . have been merged; the requirement that a juror may be excluded only if he would never vote for the death penalty is now missing; gone too is the extremely high burden of proof.").
84. Id. at 424.
85. Id. at 424-25. The Court stated:
What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear;" these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.
Id. (emphasis added) (footnote omitted).
86. Id. at 428. The Court relied on the decision in Patton v. Yount, 467 U.S. 1025 (1984), which addressed the issue of exclusion because of bias, and concluded that the question at issue was: "[d]id [the] juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestations of impartiality have been believed." Wainwright, 469 U.S. at 423-24 (quoting Patton, 467 U.S. at 1036).
87. Witherspoon v. Illinois, 391 U.S. 510, rel'y denied, 393 U.S. 898 (1968); Wainwright, 469 U.S. 412. The Wainwright Court stated that its decision was
trial judge's subjective exclusion of jurors and only allowed exclusion of jurors who “automatically opposed” the death penalty. In contrast, Wainwright permitted exclusion of jurors if a trial judge made a subjective determination that the juror could not impose the law. The Wainwright decision further commanded appellate courts to give a trial judge's determination great deference. The conflict between Witherspoon and Wainwright is irreconcilable. Without overruling Witherspoon, Wainwright abrogated the requirement that a juror must objectively and automatically oppose the death penalty to warrant exclusion, and, in its meant to “clarify” the Witherspoon decision and to reaffirm the Adams decision. See supra note 12, at 205. For example, although the Wainwright Court stated that the Adams decision (“substantially impair” language) was preferable to the Witherspoon decision (“automatically opposed” language), many practitioners had believed that Adams and Witherspoon were consistent. In fact, Adams had quoted with approval the language from Witherspoon. Id. Thompson has postulated further that the Wainwright Court's failure to acknowledge the change in the law permitted the Wainwright majority to avoid the burden of justifying its abrogation of the Witherspoon holding. Arguably, such a justification would have been very difficult because the impetus behind Witherspoon was to protect a defendant's Sixth Amendment right to an impartial jury—a right fundamental to the essence of the Constitution. For a discussion of the fundamental value of a trial by jury in the American criminal justice system, see supra notes 1-2 and accompanying text.

88. Witherspoon, 391 U.S. at 522 n.21. The Witherspoon Court had indicated that the State still had the right to exclude jurors who made it “unmistakably clear” that they “automatically” would vote against the death penalty. As a result, trial judges retained little, if any, discretion because only those jurors who displayed an inability to impose the death penalty could be excluded. Id. The Wainwright Court, however, permitted exclusion when the “trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.” Wainwright, 469 U.S. at 425-26.

One commentator has aptly illustrated the contradiction between Wainwright and Witherspoon. See Thompson, supra note 12, at 211 (noting that judges are allowed “to rely on impressionistic evidence and own subjective reactions” in Wainwright but not in Witherspoon). Thompson asserted: “This subjective evaluation allowed under Witt, was explicitly forbidden by Witherspoon. Witherspoon emphasized that in determining a potential juror's qualifications, the judge must rely on what the juror actually said, not only what the judge inferred or assumed about the juror's position.” (emphasis added). By failing to clearly overrule Witherspoon and explain the reasoning behind such abrogation, the Supreme Court set a confusing precedent and permitted haphazard exclusion of jurors that depended not so much on the ability of the juror to truly follow the law, but on the trial judge's own perception of impartiality. See id. at 211.

89. Wainwright, 469 U.S. at 426.

90. Id.

91. Brown, Note, supra note 2, at 571 (noting that Wainwright decision emasculated Witherspoon formula and arguing that “in reality the two [Witt and Witherspoon] tests differ vastly in language and substance”).
stead, substituted a subjective standard for such exclusion.92

D. The Reverse-Witherspoon Inquiry

Although Witherspoon and its progeny addressed the prosecutor's right to pose questions to prospective jurors regarding their capital sentencing views, few cases addressed whether defense counsel possessed a similar right.93 In the years immediately following the Witherspoon decision, prosecutors could specifically ask jurors whether they would automatically oppose the death penalty or whether they would be unable to impose the death penalty upon conviction.94 Courts and commentators coined this the "Witherspoon inquiry."95 However, the issue of whether defense counsel could ask jurors if they would automatically impose the death penalty upon conviction remained undecided for twenty years following Witherspoon.96 Courts and commentators coined this the "reverse-Witherspoon inquiry."97

92. For an in depth discussion of the varying standards, see supra notes 70-91 and accompanying text and Thompson, supra note 12, at 211-12 (noting that subjective evaluation for exclusion in Wainwright was explicitly forbidden by Witherspoon).

93. Witherspoon, 391 U.S. 510 (1968). The original intent of the Witherspoon Court was to limit the prosecutor's challenges for cause where jurors only expressed hesitation against imposing the death penalty. Id. at 520. For a discussion of how courts following the Witherspoon decision interpreted its language, see supra note 75.

94. See, e.g., People v. Gallego, 802 P.2d 169, 209-10 (Cal. 1990) (trial court questioned jurors as to whether they could "follow the law and impose death"), cert. denied, 112 S. Ct. 337 (1991); People v. Bittaker, 774 P.2d 659, 678 (Cal. 1989) (court questioned jurors: "Do you have such a conscientious opinion or religious conviction regarding the death penalty that if you found the defendant guilty... you would automatically find the penalty to be life imprisonment"), cert. denied, 496 U.S. 931 (1990), and reh'g denied, 497 U.S. 1046 (1990); Skipper v. State, 364 S.E.2d 835, 839 (Ga. 1988) (proper question in voir dire includes: "Are you conscientiously opposed to capital punishment?").

95. Witherspoon v. Illinois, 391 U.S. 510, 93 U.S. 898 (1968). Those jurors who were removed as a result of their response to the Witherspoon inquiry were called "Witherspoon excludables." See Lockhart v. McCree, 476 U.S. 162, 170 (1986). Lockhart defined "Witherspoon excludables" as those jurors "whose opposition to the death penalty is so strong that it would prevent them from impartially determining a capital defendant's guilt or innocence." Id. Arguably, the Lockhart Court feared that a juror who strongly opposed the death penalty would rather acquit the defendant than find him guilty and be forced to impose the death penalty.


97. People v. Brisbon, 478 N.E.2d 402, 409 (Ill. 1985), cert. denied, 474 U.S. 908 (1985). Brisbon may have been the first court to coin the phrase "reverse-Witherspoon." Id. Brisbon stated that a "reverse-Witherspoon inquiry" was equivalent to a "life qualification" permitting exclusion of all jurors who would automatically impose the death penalty. Id.
Ross v. Oklahoma, a 1988 Supreme Court decision finally addressed the "reverse-Witherspoon" issue, albeit in dicta. The Ross Court stated that after Witherspoon, a trial court's refusal to remove a juror who asserted that he or she would automatically impose the death penalty would constitute error under certain circumstances. Thus, the Ross Court seemingly condoned a defense counsel's request to pose a "reverse-Witherspoon inquiry." However, because the Court only discussed such an inquiry in dicta, many trial courts refused to follow this rule and curtailed defense counsels' questioning of potential jurors. Subsequent to Ross, state courts diverged on the permissibility of posing a "reverse-Witherspoon inquiry." Thus, although Duncan and Irvin entitled a defendant to an impartial jury, states differed as to whether this impartiality requirement mandated a "reverse-Witherspoon inquiry."

E. A Divergence in State Case Law Concerning the Applicability of The Reverse-Witherspoon Inquiry

Two distinct views developed regarding the propriety of a defense counsel's request to pose a "reverse-Witherspoon inquiry." An exam-

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99. Id. at 84. In Ross, a prospective juror declared that if the jury found the defendant guilty, he would automatically vote for the imposition of the death penalty. Id. Although the court did not excuse this juror for cause, the defense counsel used a peremptory challenge to remove him. Id. As a result, he did not sit on the panel that later convicted and sentenced the defendant to death. Id. The Court stated, however, that "[h]ad [the juror] sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove [him], the sentence would have to be overturned." Id. at 85.
100. Id. at 85.
101. Id.
102. For a discussion of several state court decisions refusing to permit a "reverse-Witherspoon inquiry" and the defendant's ability to empanel an impartial jury in these jurisdictions, see infra notes 106-13 and accompanying text.
103. For a discussion of the divergence in state case law concerning the appropriateness of posing a "reverse-Witherspoon inquiry," see infra notes 106-28 and accompanying text.
ple of the first view is the Supreme Court of South Carolina's decision in State v. Hyman. In Hyman, the defendant contended that the trial court's failure to ask each prospective juror whether he or she was "unalterably opposed to granting a life sentence in a murder case" constituted reversible error. The South Carolina Court rejected this argument and held that simply asking whether a juror could give both the state and the defendant a fair trial was constitutionally sufficient. In so holding, the Supreme Court of that trial court does have to pose "reverse-Witherspoon inquiry" to protect defendant's Sixth Amendment right to impartial jury).

107. Id. at 211. The trial jury convicted the defendant of armed robbery and murder and the same jury sentenced the defendant to death. Id. On appeal, the defendant argued that the trial court erred in failing to clearly ascertain whether the jurors would automatically impose the death penalty upon conviction. Id.
108. Id. The Supreme Court of South Carolina summarily rejected the defendant's argument. Id. The court asserted that "[a] review of the voir dire examination in this case reveal[ed] that the prospective jurors were asked if they could give both the State and the appellant a fair and impartial trial. The voir dire conducted ensured the appellant was so tried." Id.
109. Id. Several states support the Hyman view that it is constitutionally sufficient to ask a potential juror if he or she would be fair and impartial. See, e.g., Riley v. State, 585 A.2d 719 (Del. 1990), cert. denied, 111 S. Ct. 2840 (1991), and abrogated by Morgan v. Illinois, 112 S. Ct. 2222 (1992). In Riley, the Supreme Court of Delaware rejected the defendant's contention that the trial court's refusal to pose a "reverse-Witherspoon inquiry" violated the defendant's Sixth Amendment right to an impartial jury. Id. at 725. According to the court, "it would be redundant to require the trial court to further interrogate the jurors as to whether they would automatically impose the death penalty upon a finding of guilt." Id.

Ironically, the Riley court did not find it "redundant" to allow the prosecution to further interrogate the jurors to determine whether they would automatically oppose the death penalty. In other words, it was redundant for the defense to pose a "reverse-Witherspoon inquiry," but it was not redundant for the prosecution to pose a traditional "Witherspoon inquiry." For a discussion of the inconsistency in this reasoning, see infra notes 111-13 & 125-28 and accompanying text.

In accord with the Hyman and Riley view is People v. Bittaker, 774 P.2d 659 (Cal. 1989), cert. denied, 496 U.S. 931 (1990), and reh'g denied, 497 U.S. 1046 (1990). In Bittaker, the Supreme Court of California affirmed a death sentence where the trial court refused to specifically ask a juror whether he would automatically impose the death penalty. Id. at 681. The court stated: "The right to voir dire . . . is not a constitutional right but a means to achieve the end of an impartial jury." Id. Although the California Supreme Court stated that the defense should have been permitted to ask additional questions of some jurors who gave ambiguous answers, every juror that gave an ambiguous answer was removed by the defense or the prosecution by use of a peremptory challenge. Id. Thus, while the trial court should have permitted the defense to ask these questions, the court held that it was harmless error because the jurors were ultimately removed by use of peremptory challenges. Id.

Although the Bittaker court seemed to embrace the Hyman and Riley view, it is important to note that the California Supreme Court confronted a case in
South Carolina advanced the view that although the Sixth Amendment entitled the defendant to an impartial jury, the Constitution did not require a "reverse-Witherspoon inquiry."\textsuperscript{110} This view led to a disparity in the questioning available to determine a juror's impartiality.\textsuperscript{111} Under jurisdictions following the Hyman view, the Constitution enabled both the prosecution and the defense to request the trial judge to pose the general question of whether a juror could be impartial.\textsuperscript{112} However, the Hyman view only enabled the prosecution to request that the trial judge pose a further and more specific question to potential jurors—would you automatically oppose the death penalty?\textsuperscript{113}

Other courts rejected this unbalanced exchange, adopting a different approach to the Witherspoon inquiry. This approach required the prosecution to pose a "reverse-Witherspoon inquiry," which the defendant had brutally and mercilessly raped, beaten, tortured and murdered five young girls. \textit{Id.} at 664-65. This author notes that it is arguable that these distinctions provided the court with a legal justification to uphold a sentence of a defendant who had nicknamed himself "Bittaker pliers" and bragged that he had "pinched a victim's legs and breast with a vice grip finally tearing off a nipple, then thrust an ice pick through the breast . . . and through [her] ear" until she finally fell dead. \textit{Id.} at 668-69. The court concluded:

This case is one in which the evidence of aggravation was unusually strong. Defendant kidnapped and murdered five teenage girls, raped four of them and tortured at least one. The photographs of the victims, and the shocking tape recording of the torture of the last victim could not help but impress a jury. . . . \textit{On this record} we can declare that there is no reasonable possibility that had the errors not occurred a different verdict would have been rendered. The judgment is affirmed. \textit{Id.} at 697. Thus, although this case clearly supports the view that the constitution does not require a "reverse-Witherspoon inquiry," the extreme brutality of the crimes may suggest an impetus for the court's holding.

\textsuperscript{110} Hyman, 281 S.E.2d at 211.

\textsuperscript{111} See, e.g., Riley, 585 A.2d at 725 (permitting prosecution to pose a "Witherspoon inquiry" but refusing defense request to pose "reverse-Witherspoon inquiry"); State v. Norton, 675 P.2d 577, 589 (Utah 1983) (same), cert. denied, 66 U.S. 942 (1984), and overruled on other grounds by State v. Hansen, 734 P.2d 421 (1986). For a further discussion of this disparity, see infra notes 112-13 & 125-28 and accompanying text.

\textsuperscript{112} See, e.g., People v. Jackson, 582 N.E.2d 125, 156 (Ill. 1991) (noting that no constitutional violation of defendant's Sixth Amendment right occurred where "each juror swore to uphold the law regardless of his or her personal feelings, and no juror expressed any views that would call his or her impartiality into question"), cert. granted and judgment vacated by 113 S. Ct. 32 (1992) (subsequent to Morgan v. Illinois, 112 S. Ct. 2222 (1992)); Hyman, 281 S.E.2d at 211 (finding impartiality assured by trial court's asking prospective jurors whether they could give both state and defendant fair and impartial trial), cert. denied, 458 U.S. 1122 (1982), and reh'g denied, 458 U.S. 1132 (1982).

\textsuperscript{113} See, e.g., Riley, 585 A.2d at 725 (affirming conviction and sentence where trial court permitted prosecution to ask jurors about ability to impose death penalty but refused to permit defense to ask jurors about ability to impose life sentence); State v. Rogers, 341 S.E.2d 713, 722 (N.C. 1986) (affirming conviction and sentence where trial court permitted prosecution to pose Witherspoon inquiry but refused defense counsel's request to pose "reverse-Witherspoon inquiry"), overruled on other grounds by State v. Vandiver, 364 S.E.2d 373 (N.C. 1988).
ent view of the "reverse-Witherspoon inquiry." The Supreme Court of Georgia addressed the propriety of the trial court's refusal to allow a "reverse-Witherspoon inquiry." The trial court had refused the defendant's request to ask jurors whether they would be capable of considering penalties other than death. The Supreme Court of Georgia held that the trial court's refusal to accede to the defendant's request deprived the defendant of his constitutional right to an impartial jury. The Georgia court reasoned that "[t]he trial court's limitation on voir dire deprived the defendant of an opportunity to determine whether prospective jurors were impartial on the question of sentence."

In accord with Skipper is the New Jersey Supreme Court decision State v. Williams. In Williams, the court addressed the propriety of the trial court's refusal to ask jurors who stated that they favored the death penalty in certain cases whether they favored the death penalty in murder and rape cases. The New Jersey Supreme Court held that the refusal to so inquire, coupled with other errors, constituted a violation of the defendant's right to an impartial jury. Accordingly, the court

114. See, e.g., Morris v. Commonwealth, 766 S.W.2d 58, 60 (Ky. 1989) (recognizing constitutional propriety of posing "reverse-Witherspoon inquiry" and reversing sentence where trial court refused to strike jurors who indicated they would automatically impose the death penalty upon conviction); Pickens v. State, 730 S.W.2d 230, 234 (Ark. 1987) (reversing defendant's conviction and recognizing that "proper inquiry on voir dire . . . would be to ask the veniremen if they would first consider and weigh the aggravating and mitigating circumstances involved when determining whether to impose a death sentence or life imprisonment without parole), cert. denied, 484 U.S. 917 (1987).

115. 564 S.E.2d 835 (Ga. 1988).

116. Id. at 839. In Skipper, the defendant appealed a death sentence after his conviction for murder, sodomy and rape. Id. at 836-38.

117. Id. at 839. The court stated: "The trial court's limitation on voir dire deprived the defendant of an opportunity to determine whether prospective jurors were impartial on the question of sentence." Id. Specifically, a juror who said she "would vote for it [death penalty]" was not allowed to be examined further as to whether she would vote for it in "all circumstances." Id. at 839 n.2.

118. Id. at 839. The Supreme Court of Georgia recognized that:
A criminal defendant is entitled to an impartial jury by the Sixth Amendment to the U.S. Constitution. A juror who has made up his mind prior to trial that he will not weigh evidence in mitigation is not impartial. [Such a] juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

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

119. Id.

120. 550 A.2d 1172 (N.J. 1988).

121. Id. at 1182.

122. Id. at 1184. The New Jersey court stated the "trial court's refusal to allow questions that . . . provide important insight into any juror's attitude . . . constitutes serious error . . . [because] the lawyers and the court were prevented from gathering information about whether a juror would automatically impose the death penalty on a defendant found guilty of rape and murder." Id. This
reversed the sentence, holding that the trial judge must allow the defense counsel to question prospective jurors about their ability to consider a life sentence.\footnote{123} The court viewed such questioning as an essential element in preserving the defendant's ability to receive an impartial trial.\footnote{124}

This distinct divergence in state views led to diametrically opposed results in case law.\footnote{125} For example, the trial court's failure to permit

language seemed to condone questions even more expansive than a "reverse-Witherspoon inquiry" permitting questions on juror's attitudes concerning "a rape and a murder." \footnote{Id.} The Williams court, however, retreated from this broad interpretation when it concluded "[w]hether or not the trial court's refusal to inquire further regarding the murder and rape issue would, by itself, suffice to compel reversal we do not decide; the trial court's failure to make this inquiry is . . . a significant component of the deficiencies on which our result . . . is based." \footnote{Id.} Thus, even though a refusal to pose a "reverse-Witherspoon inquiry" impairs the defense counsel's ability to empanel an impartial jury, it may not be sufficient to require automatic reversal. \footnote{Id.}

\footnote{123. \textit{Id.} The Williams court stated: [A] juror who will not, or cannot, consider relevant mitigating evidence pertaining to the defendant . . . is "substantially impaired" under the Adams-Wilt test. Therefore, the failure to inquire into whether any juror could consider the mitigation evidence . . . denied counsel and the trial court the tools with which to insure that the jury panel could fairly undertake its role in this case. \footnote{Id.}}

\footnote{124. \textit{Id.} Other courts have adopted the Hyman and Williams view. \textit{See}, e.g., Patterson v. Commonwealth, 283 S.E.2d 212, 215 (Va. 1981) (reversing sentence where trial court refused to pose question: "Do you feel that regardless of the facts or circumstances that in every case of murder the death penalty should be imposed?") (superseded by statute on other grounds as stated in Evans v. Commonwealth, 323 S.E.2d 114, 117 (1984), \textit{cert. denied}, 471 U.S. 1025 (1985)); Morris v. Commonwealth, 766 S.W.2d 58, 60 (Ky. 1989) (reversing sentence where trial court refused to exclude four jurors who stated they would only consider the death penalty if conviction resulted); State v. Norton, 675 P.2d 577, 589 (Utah 1983) (holding that "the court should inquire, when so requested by the defendant, whether there are any jurors whose convictions would compel them to vote for capital punishment for all persons convicted of murder"), \textit{cert. denied}, 66 U.S. 942 (1984), and \textit{overruled on other grounds} by State v. Hansen, 734 P.2d 421 (Utah 1986).}

In Patterson, the Supreme Court of Virginia agreed with the defense counsel's argument that "if the prosecutor has a right to exclude such veniremen for cause, 'certainly the Defendant should have a right to exclude for cause those jurors who are irrevocably committed to voting for the death penalty in the event of a conviction of the capital offense.'" \footnote{Patterson, 283 S.E.2d at 215. In \textit{Morris}, the Supreme Court of Kentucky overturned a death sentence and noted "with interest" that the trial court refused to pose a "reverse-Witherspoon inquiry" and did not exclude four jurors who said that they would automatically impose the death sentence. \textit{Morris}, 766 S.W.2d at 60. The \textit{Morris} trial court, however, willingly posed the traditional "Witherspoon inquiry" and excluded six jurors who said they would automatically oppose the death penalty. \textit{Id.} Such a dichotomy mandated reversal. \textit{Id.} In \textit{Norton}, the court asserted that in order to protect a capital defendant's interest in an impartial jury, a trial judge must pose a "reverse-Witherspoon inquiry" when so requested by the defense. \textit{Norton}, 675 P.2d at 589.}\footnote{125. Riley v. State, 585 A.2d 719, 725-26 (Del. 1990) (stating that defend-}
defense counsel to pose a "reverse-Witherspoon inquiry" in a Skipper and Williams jurisdiction resulted in a deprivation of the defendant's due process rights and required sentence reversal.\(^\text{126}\) However, in a Hyman jurisdiction, the trial court's refusal to pose a "reverse-Witherspoon inquiry" did not result in a deprivation of the defendant's due process rights.\(^\text{127}\) Thus, a defendant's constitutional rights were inextricably linked to the state in which he or she allegedly committed the crime.\(^\text{128}\)

This jurisdictional disparity set the stage for the United States Supreme Court case, Morgan v. Illinois,\(^\text{129}\) in which the Court decided whether a criminal defendant has a constitutional right to pose a "reverse-Witherspoon inquiry."\(^\text{130}\)

### III. Analysis

#### A. Facts and Procedure

In Morgan v. Illinois,\(^\text{131}\) the trial jury convicted the defendant of first-degree murder for allegedly shooting a drug dealer for four thousand dollars.\(^\text{132}\) Under Illinois law, a jury may sentence a criminal defendant convicted of first-degree murder to death.\(^\text{133}\) Illinois law, however, re-

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\(^\text{126}\) For a discussion of the requirement to pose a "reverse-Witherspoon inquiry" in a Skipper and Williams jurisdiction, see supra notes 114-24 and accompanying text.

\(^\text{127}\) For a discussion of the Hyman view rejecting the requirement to pose a "reverse-Witherspoon inquiry," see supra notes 105-13 and accompanying text.

\(^\text{128}\) See, e.g., State v. Hyman, 281 S.E.2d 209, 211-12 (S.C. 1981), cert. denied, 458 U.S. 1122, reh'g denied, 458 U.S. 1132 (1982), overruled on other grounds by State v. Torrence, 406 S.E.2d 315 (S.C. 1991), and abrogated by Morgan v. Illinois 112 S. Ct. 2222 (1992). According to Hyman, a defendant on trial for a capital crime in South Carolina does not have a constitutional right to pose a "reverse-Witherspoon inquiry." Id. However, if the same defendant was tried in New Jersey, he would have a constitutional right to pose a "reverse-Witherspoon inquiry." See, e.g., Williams, 550 A.2d at 1184 (holding that failure to permit "reverse-Witherspoon inquiry" would deny defendant his constitutional right to obtain impartial jury).


\(^\text{130}\) For a discussion of the issues presented in Morgan v. Illinois, 112 S. Ct. 2222 (1992), see infra notes 141-76 and accompanying text.

\(^\text{131}\) 112 S. Ct. 2222 (1992).

\(^\text{132}\) Id. at 2226. Defendant Morgan was hired to kill a rival drug dealer. Id. The El Rukns, a notorious Chicago gang, gave defendant four thousand dollars to murder the drug dealer who had allegedly been competing with the El Rukns' narcotics business. Id. Morgan lured the victim into an abandoned apartment and shot him in the head six times. Id.

\(^\text{133}\) ILL. ANN. STAT. ch. 38, para. 9-1(b)(5) (Smith-Hurd Supp. 1992). Under Illinois criminal law, at least one aggravating factor must be present to
requires a jury to consider aggravating and mitigating factors prior to rendering a sentence.\textsuperscript{134}

Subsequent to the presentation of aggravating and mitigating evidence, the Morgan jury returned a sentence of death.\textsuperscript{135} The defendant appealed.\textsuperscript{136} On appeal, the defendant alleged a violation of his Sixth Amendment right to an impartial jury based on the trial court’s refusal to ask jurors whether they would automatically impose the death penalty upon conviction.\textsuperscript{137} The alleged failure, therefore, was the trial court’s refusal to pose a “reverse-Witherspoon inquiry.”\textsuperscript{138} Both the Illinois appellate court and the Illinois Supreme Court rejected this argument and affirmed the defendant’s death sentence.\textsuperscript{139} The defendant subsequently petitioned the United States Supreme Court to decide the issue, and the Supreme Court granted certiorari.\textsuperscript{140}

B. The Analysis of the Morgan Court

On appeal, the United States Supreme Court addressed four issues concerning the procedures in a capital trial: 1) whether a sentencing jury in a capital hearing must be impartial; 2) whether a juror who advertises imposition of the death penalty. \textit{Id.} para. 9-1(g). The statute reads: “If at the separate sentencing proceeding the jury finds that none of the factors set forth in subsection (b) exists, [aggravating factors] the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.” \textit{Id.}\textsuperscript{134}. \textit{Id.} para. 9-1(d)(1). The statute states that a separate sentencing proceeding to determine the existence of aggravating and mitigating factors “shall be conducted . . . before the jury that determined the defendant’s guilt . . . or before the court if the defendant waives a jury for the separate proceeding.” \textit{Id.} The statute also provides that either the court or the jury “shall consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty.” \textit{Id.} para. 9-1(c) (emphasis added). For a further discussion of the Illinois statute’s requirement that a jury “consider” aggravating and mitigating factors and the Morgan Court’s interpretation of this requirement, see \textit{infra} notes 163-70 and accompanying text.

\textsuperscript{135} Morgan, 112 S. Ct. at 2227.
\textsuperscript{136} Id.
\textsuperscript{137} Id. In Duncan v. Louisiana, 391 U.S. 145, 149, \textit{reh'g denied}, 392 U.S. 947 (1968), the Supreme Court held that the Sixth Amendment right to a jury trial applied to the states through the Fourteenth Amendment. For a more detailed discussion of the Duncan decision and the evolution of the constitutional guarantees afforded to a state criminal defendant, see \textit{supra} notes 31-51 and accompanying text.

\textsuperscript{138} Morgan, 112 S. Ct. at 2227.
\textsuperscript{139} Id. The Illinois Supreme Court rejected petitioner’s claim that pursuant to Ross v. Oklahoma, 487 U.S. 81, \textit{reh'g denied}, 487 U.S. 1250 (1988), voir dire must include a “reverse-\textit{Witherspoon} inquiry.” \textit{Morgan}, 112 S. Ct. at 2227. The Illinois Supreme Court instead concluded that there is no requirement in a capital case that a trial court question jurors to determine who would vote for the death penalty in every case upon conviction. \textit{Id.} (citing People v. Morgan, 568 N.E.2d 755, 778 (III. 1991), \textit{cert. granted}, 112 S.Ct. 295 (1991), and \textit{judgment reversed by} 112 S. Ct. 2222 (1992)).

\textsuperscript{140} Morgan, 112 S. Ct. at 2227.
mits during voir dire that he or she automatically will impose the death penalty upon conviction may be challenged for cause; 3) whether the trial court, upon defendant's request, must question a prospective juror about his views toward capital punishment; and 4) whether the trial court's voir dire was constitutionally sufficient.141

1. The Requirement That a Capital Sentencing Juror Be Impartial

The Morgan Court relied on Duncan v. Louisiana142 in concluding that the defendant was entitled to an impartial sentencing jury.143 The Court recognized that although no law specifically required Illinois to utilize jurors in the sentencing phase, once Illinois chose to provide defendants with a jury in the sentencing phase, that jury had to remain impartial.144 According to the Morgan Court, a failure to afford the defendant an impartial sentencing jury violated even the minimal standards of due process.145 The Court opined that a sentencing juror who is not impartial will not base his or her verdict on the mitigating and aggravating evidence presented, but rather, will make an ad hoc determination that essentially denies the defendant the right to a "fair trial in a fair tribunal."146

141. For a discussion of the Morgan Court's determination that a sentencing jury in a capital hearing must be impartial, see infra notes 142-46 and accompanying text. For a discussion of the Morgan Court's determination that a juror, who admits that he or she will automatically impose the death penalty upon conviction, must be excluded for cause, see infra notes 147-57 and accompanying text. For a discussion of the Morgan Court's determination that a trial court, upon defendant's request must permit questioning concerning a juror's views on capital punishment, see infra notes 158-70 and accompanying text. For a discussion of the Morgan Court's finding on the constitutional insufficiency of the trial court's voir dire, see infra notes 171-76 and accompanying text.

142. 391 U.S. 145, reh'g denied, 392 U.S. 947 (1968); see Irvin v. Dowd, 366 U.S. 717 (1961). For a discussion of the Court's determination that the Sixth Amendment's guarantee to an impartial jury applies to the states through the Fourteenth Amendment, see supra notes 31-51 and accompanying text.

143. Morgan, 112 S. Ct. at 2228. The Morgan majority adhered to prior Supreme Court decisions that refused to reverse criminal defendants' convictions where the same jurors who were "death qualified" were held not to be impartial in the sentencing phase. Id. at 2235 n.11 (citing Witherspoon v. Illinois, 391 U.S. 510, 523 n.21 (1968)).

144. Morgan, 112 S. Ct. at 2228. The Morgan Court recognized that states are not required to provide a jury to a defendant during the sentencing phase of a criminal trial. Id. (citing Spaziano v. Florida, 468 U.S. 447, 464 (1984), cert. denied, 479 U.S. 995 (1986)). If, however, a state voluntarily chooses to let a jury determine the sentence, that jury must meet the constitutional guarantees provided under the Sixth Amendment and the Fourteenth Amendment. Id. In Duncan, the Supreme Court held that the Due Process Clause incorporated the Sixth Amendment's mandate to state proceedings. Duncan, 391 U.S. at 157-58. For a more detailed discussion of the Duncan holding, see supra notes 36-42 and accompanying text.

145. Morgan, 112 S. Ct. at 2228 (citing In re Oliver, 333 U.S. 257 (1948) and Tumey v. Ohio, 273 U.S. 510 (1927)).

146. Morgan, 112 S. Ct. at 2228. The Supreme Court noted that the de-
2. Ensuring Impartiality: Challenges for Cause

Once the Morgan Court determined that Duncan entitled a criminal defendant to an impartial sentencing jury, the Court faced the difficult task of determining the means for ensuring impartiality.147 The Morgan Court reexamined the Wainwright and Adams standard, which provides: "[T]he proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair' the performance of his duties as a juror in accordance with his instructions and his oath."148 The Court stated that Wainwright and Adams espoused the principle that a juror who automatically opposed the death penalty was not impartial and must be removed for cause.149

The Court then reexamined its decision in Ross, which indicated that a trial judge's refusal to remove a juror who was not impartial constituted a constitutional error.150 The Court noted that contrary to Wainwright and Adams, the Ross Court addressed whether a juror who would automatically impose the death penalty was partial and should be removed for cause.151

The Morgan Court embraced the Ross language that read, "[h]ad [the juror] sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove [the juror] for cause, the sentence would have to be overturned."152 The Court applied this reasoning to the facts in Morgan, and concluded that a juror who automatically will impose the death penalty without considering mitigating factors is not impartial as required by the Sixth Amendment.153 The Morgan Court held that defendants who often covet the protections of the Sixth and Fourteenth Amendments are those accused of the most heinous of crimes, who appear most guilty and are in the lowest stations of life. Id. However, those characteristics in no way lessen the constitutional guarantees of impartiality, and therefore, any violation of this impartiality violates the defendant's due process rights. Id. at 2229.

147. Id. at 2229. For a discussion of the difficulties that trial courts face in attempting to identify impartial jurors, see supra notes 66-128 and accompanying text.


149. Id. For a discussion of the removal for cause of jurors who would automatically oppose the death penalty, see supra notes 70-76. The Wainwright and Adams decisions, in fact, did not require a juror to automatically oppose the death penalty as the Morgan majority states. Wainwright, 469 U.S. at 412; Adams, 448 U.S. at 45. Rather, Witherspoon v. Illinois, 391 U.S. 510 (1968), mandated exclusion of jurors who automatically opposed the death penalty. Id.


151. Ross, 487 U.S. at 85.

152. Morgan, 112 S. Ct. at 2229 (quoting Ross, 487 U.S. at 85).

153. Id. The Court stated: "[A] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of
cause such a juror will be unable to follow the law, he or she must be excluded for cause. Failure to exclude such juror would require the sentence to be overturned.

In the dissent, Justice Scalia, joined by two other justices, found that Illinois law does not require that jurors consider mitigating evidence. Rather, the dissent interpreted the Illinois criminal statute to allow jurors to define for themselves what constitutes a mitigating factor and to refuse to impose a life sentence if the facts are not "sufficient[ly]" mitigating.

3. The Insufficiency of a General Voir Dire

Although the Morgan Court acknowledged that the Constitution provides no specific requirements for a trial court's conduct in voir dire proceedings, the Court concluded that the Constitution does require adequate voir dire questioning to identify unqualified jurors. The aggravating and mitigating circumstances as the instructions require him to do."

Id. The Illinois criminal statute, pertinent to the case at bar, requires jurors in a sentencing phase to consider both aggravating and mitigating factors to determine the appropriate sentence. See Ill. Ann. Stat. ch. 38, para.9-1(c) (Smith-Hurd Supp. 1992) (stating that court or jury "shall consider any aggravating or mitigating factors which are relevant"). For a discussion of the relevant provision in the Illinois criminal statute, see supra notes 133-34 and accompanying text.

154. Morgan, 112 S. Ct. at 2229. Exclusion for cause is appropriate where the juror questioned would be unable to follow the law. Id. For example, in Ham v. South Carolina, 409 U.S. 524, 526 (1973), the Supreme Court held that a trial court must exclude for cause a prospective juror whose racial prejudice makes it impossible for the juror to remain fair and impartial. For a discussion of exclusion for cause, see supra note 11 and accompanying text.

155. Morgan, 112 S. Ct. at 2230. No court, including Morgan, which has addressed an impartiality issue under either a "Witherspoon" or "reverse-Witherspoon" inquiry, has held that an appellate court must overturn a guilty verdict based on the failure to meet constitutional impartiality requirements. See Witherspoon v. Illinois, 391 U.S. 510, 518 (1968) (no bias shown with respect to guilt phase of trial); Skipper v. State, 364 S.E.2d 835, 839 (Ga. 1988) (error as to sentence does not affect conviction); State v. Norton, 675 P.2d 577, 589 (Utah 1983) (conviction affirmed but sentence vacated for error in voir dire), cert. denied, 466 U.S. 942 (1984), and overruled on other grounds by State v. Hansen, 734 P.2d 421 (1986); Patterson v. Commonwealth, 283 S.E.2d 212, 216 (Va. 1981) (jury not meeting constitutional standards in sentencing not necessarily biased as to guilt).

156. Morgan, 112 S. Ct. at 2237 (Scalia, J., dissenting). Justice Scalia, Chief Justice Rehnquist and Justice Thomas joined in the dissent. Id. (Scalia, J., dissenting).

157. Id. (Scalia, J., dissenting).

158. Id. at 2230. While the intent of voir dire is to obtain an impartial jury, the Constitution does not "dictate a catechism for voir dire." Id. The State of Illinois argued that the trial court's general questioning concerning a juror's ability to be fair and impartial was sufficient to obtain an impartial jury. Id. The Morgan majority rejected this argument. Id. at 2233. The Court explained that a juror who dogmatically supported the death penalty for all capital offenses could honestly believe that he or she is fair and impartial. Id. In Morgan, for example,
Court held that in a death penalty case, an adequate voir dire requires a judge to ask, when requested by the defense, whether a juror would "automatically impose" the death penalty upon conviction. Insofar as a trial court refuses to pose such a question, the defendant's Sixth Amendment rights are violated and the sentence must be overturned.

The Court further emphasized the importance of voir dire in cases in which the prosecution seeks the death penalty. The Court held that direct questioning about a juror's inclination to impose the death penalty would protect a defendant and would enable a court to sequester an impartial jury as required under the Constitution.

The Morgan majority further emphasized that a juror who admits that he or she automatically would impose the death penalty upon conviction cannot be impartial because such an admission portrays an inability to "consider" any mitigating factors as required under Illinois law. The Court reasoned that the language of the statute mandating that a juror consider mitigating evidence would be meaningless if a juror were free to disregard even the presentation of mitigating evidence.

One juror who had initially answered that she could be fair and impartial, upon further questioning, later admitted that if guilt was established, she would "want [defendant] hung." Id. at 2227 n.2.

159. Id. at 2233. At a minimum, the Morgan Court permits a defendant on trial to "ascertain" whether jurors who believe they are impartial actually would remain impartial once the trial court renders a guilty verdict. Id. This line of questioning is similar to other voir dire inquiries that attempt to determine the impartiality of a prospective juror. See Aldridge v. United States, 283 U.S. 308, 314 (1931) (essential demands of fairness require that defense be able to determine whether juror is racially prejudiced against defendant's race). For a discussion of the case law requiring interrogation of prospective jurors regarding racial prejudice, see supra notes 58-65 and accompanying text. Furthermore, after Witherspoon v. Illinois, direct inquiry concerning a juror's inability to impose the death penalty was permitted. See 391 U.S. 510 (1968). For a discussion of the Witherspoon decision, see supra notes 70-76 & 87-92 and accompanying text. The Morgan Court based its decision on this prior case law that had embraced direct questioning as essential to determine impartiality. 112 S. Ct. at 2230-31.

160. Morgan, 112 S. Ct. at 2235. The Court stated that the jury empaneled did not meet the constitutional requirements of the Sixth Amendment and the Fourteenth Amendment. Id. For a discussion of the Sixth Amendment and its application to states by virtue of the Fourteenth Amendment, see supra notes 31-51 and accompanying text.

161. Morgan, 112 S. Ct. at 2223. The Court stated that "[a] defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors" are impartial. Id. In addition, the Court indicated that such a determination could be easily made by allowing a direct question, such as, "Would you automatically impose the death penalty if you found defendant guilty?" Id. Significantly, the Court determined that the risk assumed by asking such a question is far less than the risk assumed by failing to ask such a question and having a biased jury. Id. (citing Turner v. Murray, 476 U.S. 28, 35-36 (1986), cert. denied, 486 U.S. 1017 (1988)).

162. Id. at 2231. For a discussion of the requirement of impartiality in a capital sentencing case, see supra notes 66-124 and accompanying text.

163. 112 S. Ct. at 2234.

164. Id. The Illinois statute mandates that a judge or jury "shall consider
Court recognized, however, that although Illinois law requires a juror to "consider" mitigating factors prior to rendering a sentence, it does not compel a juror to accept any or all evidence as sufficiently mitigating.\textsuperscript{165} The dissent disagreed with the majority's interpretation of the Illinois law.\textsuperscript{166} The dissent stated that 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."\textsuperscript{167} The dissent read the Illinois criminal statute requiring a jury to "consider" mitigating factors to mean that a juror who believes any evidence is mitigating may consider that evidence and determine the punishment.\textsuperscript{168} A juror who fails to find any evidence to be mitigating is not failing to follow the law, but is failing to "give it the effect the defendant desires."\textsuperscript{169} Accordingly, the dissent would have held that a juror under Illinois law may always disregard such evidence.\textsuperscript{170}

4. The Insufficiency of the Trial Court's Voir Dire

The Morgan trial court asked each prospective juror general questions concerning his or her ability to be impartial.\textsuperscript{171} On appeal to the United States Supreme Court, the Morgan majority found the voir dire to be constitutionally inadequate, noting that jurors who respond affirmatively may still have views that inhibit their ability to follow the law.\textsuperscript{172} The majority further noted the inconsistency in permitting defense

\textsuperscript{165} Morgan, 112 S. Ct. at 2234.
\textsuperscript{166} Id. at 2237 (Scalia, J., dissenting).
\textsuperscript{167} Id. (Scalia, J., dissenting).
\textsuperscript{168} Id. (Scalia, J., dissenting). The Morgan majority stated that the dissent misread the language of the Illinois statute by concluding that no consideration is required. \textit{Id.} at 2234. In fact, the majority stated that the statute is clear in mandating that a court shall consider, or instruct the jury to consider any mitigating evidence presented. \textit{Id.; see also} ILL. ANN. STAT. ch. 38, para.9-1 (Smith-Hurd Supp. 1992). The majority stated that the only thing the statute does not mandate is the conclusion that a juror must reach. Morgan, 112 S. Ct. at 2234. Thus, two jurors who consider the presented evidence may come to varying conclusions on the effect to be given to that evidence. \textit{Id.}

\textsuperscript{169} Morgan, 112 S. Ct. at 2237 (Scalia, J., dissenting).
\textsuperscript{170} Id. (Scalia, J., dissenting).
\textsuperscript{171} Id. at 2226-27.
\textsuperscript{172} Id. at 2233. The Morgan Court portrayed the insufficiency of general voir dire by quoting a prospective juror who stated that she would follow the law but upon further questioning indicated that she would "want the defendant hanged if he was found guilty." \textit{Id.} at 2227 n.2.
counsel to ask only general questions regarding impartiality. The Court opined that the state's own request to ask jurors whether they automatically would oppose the death penalty belied the state's argument that general questions are sufficient to determine impartiality. The Court further opined that if a juror's impartiality can be determined through general questioning, then the Witherspoon and Wainwright decisions are superfluous. Rejecting the validity of this argument, the Court held that the trial court's refusal to pose a "reverse-Witherspoon inquiry" marked the inadequacy of voir dire and mandated sentence reversal.

C. Critical Discussion of the Morgan Decision

The Morgan Court provided a bright-line rule for a trial judge conducting voir dire: when requested by defense counsel, the trial judge must ask prospective jurors whether they would automatically impose death upon conviction. In formulating this bright-line rule, the Morgan Court relied on the Sixth Amendment impartiality requirement. The Court reasoned that the very essence of impartiality is violated if a juror refuses even to consider the mitigating evidence presented by the defense. This reasoning is consistent with constitutional mandates and with the Supreme Court's prior decision in Witherspoon v. Illinois.

First, Morgan is consistent with the Sixth Amendment because it attempted to provide equality within the criminal justice system. The decision has provided the defense with the reciprocal opportunity to ascertain a juror's specific views on the death penalty. Moreover, because the Morgan decision mandates exclusion of jurors who will automatically impose death upon conviction, the resulting sentencing jury

173. Id. at 2232-33.
174. Id.
175. Id.
176. Id. at 2235.
177. Id. The Court stated:

[any juror to whom mitigating factors are 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. Accordingly, the defendant in this case was entitled to have the inquiry made that he proposed to the trial judge.

Id.

178. Id.
179. Id. at 2228-29. For a discussion of the Sixth Amendment's requirement that a jury be impartial and its application to state criminal trials by virtue of the Fourteenth Amendment, see supra notes 31-51.
181. 391 U.S. 510 (1968). For a discussion of the Witherspoon holding, see supra notes 70-76 and accompanying text.
182. Morgan, 112 S. Ct. at 2233. The Court stated "[a] defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors" are unable to follow the "dictates of the law." Id.
will be impartial.\textsuperscript{183} \textit{Witherspoon} had purported to achieve this result.\textsuperscript{184} However, prior to \textit{Morgan}, many empaneled juries merely provided impartiality for the prosecution.\textsuperscript{185} The prosecution could pose a "\textit{Witherspoon} inquiry" to determine if a juror would never vote for the death penalty.\textsuperscript{186} \textit{Morgan} provided this same opportunity to the defense.\textsuperscript{187}

The significance of \textit{Morgan} lies in its attempt to provide equality in voir dire and in its straightforward and easily applicable guidelines to achieve this result. The Court eradicated the confusion and inconsistency rampant in the voir dire process of capital trials by providing a bright-line rule for trial courts.\textsuperscript{188} This bright-line rule requires that a "reverse-\textit{Witherspoon} inquiry" be permitted when requested by the defense.\textsuperscript{189} Accordingly, imposition of a sentence will be denied if even one juror is empaneled who automatically would impose the death sentence.\textsuperscript{190} Thus, the case is significant for championing the constitutional rights of defendants in a manner that can be applied easily to future criminal cases.\textsuperscript{191}

This case also is significant because it rejected the dissent's argument that it is unnecessary for a potential juror to consider mitigating factors to be impartial.\textsuperscript{192} The dissent stated that once guilt has been established, it is perfectly legal for a juror to disregard mitigating evi-

\textsuperscript{183} See generally Dayan et al., supra note 5, at 165. Dayan noted that challenges for cause ensure impartiality because they "eliminate extremism and partiality." \textit{Id.}

\textsuperscript{184} \textit{Witherspoon}, 391 U.S. 510 (1968). For a discussion of \textit{Witherspoon}, see supra notes 70-76 and accompanying text.


\textsuperscript{186} For a discussion of the inequality in the voir dire process, see supra notes 105-28 and accompanying text.

\textsuperscript{187} \textit{Morgan}, 112 S. Ct. at 2233.

\textsuperscript{188} \textit{Id.} at 2235.

\textsuperscript{189} \textit{Id.}

\textsuperscript{190} \textit{Id.}

\textsuperscript{191} \textit{Id.} The \textit{Morgan} Court created a bright-line rule that a trial court, when requested by the defense, must ask a "reverse-\textit{Witherspoon} inquiry." \textit{Id.}

\textsuperscript{192} \textit{Id.} at 2234. The \textit{Morgan} Court stated:

\begin{quote}
Any juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider the mitigating evidence and to decide if it is \textit{sufficient} to preclude imposition of the death penalty. The statute plainly indicates that a lesser sentence is available in every case where mitigating evidence exists; thus any juror who would invariably impose the death penalty upon conviction cannot be said to have reached this decision based on all the evidence. While Justice Scalia chooses to argue that such a "merciless juror" is not a
\end{quote}
dence in his or her final decision.193 This reasoning is negated by case law requiring exclusion of potential jurors who refuse to impose the death penalty.194 According to the dissent's reasoning, a juror who states during voir dire that he or she will not consider aggravating factors and will refuse to impose the death penalty is still an impartial juror.195 However, it is well established that a juror who will not consider the death penalty is not impartial and must be excluded for cause.196 Thus, the dissent's holding would perpetuate an unfair dichotomy between the rights of the state and those of a criminal defendant.197 A juror who would never consider imposing the death penalty upon a determination of guilt would be excused as partial.198 However, a juror who would never consider opposing the death penalty upon a determination of guilt would be impartial.199 The Morgan majority refused to tip the scales of the criminal justice system in favor of the state by permitting the state to pose a "Witherspoon inquiry" while refusing to allow the defense to pose a "reverse-Witherspoon inquiry."200

The dissent also misconstrued the majority's characterization of a capital juror's role in the sentencing phase. The Morgan majority did not hold that jurors always must accept a mitigating factor presented in the sentencing phase to be sufficient to lower the sentence.201 Rather,

"lawless" one, he is in error, for such a juror will not give mitigating evidence the consideration that the statute contemplates.

Id.

193. Id. at 2236-38 (Scalia, J., dissenting).
195. Morgan, 112 S. Ct. at 2240-41 (Scalia, J., dissenting) (stating that "[t]he juror who says that he will always vote for the death penalty is not promising to be lawless, since there is not case in which is by law compelled to find a mitigating fact 'sufficiently mitigating'").
196. See Witherspoon, 391 U.S. at 522 n.21 (prospective juror must be "willing to consider all of the penalties ... [and] not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings").
197. Morgan, 112 S. Ct. at 2241 (Scalia, J., dissenting) (rejecting defendant's argument that it is unfair to permit prosecution to pose "Witherspoon inquiry" but refuse to permit defense counsel to pose "reverse-Witherspoon inquiry").
198. Id. (Scalia, J., dissenting) (stating that "[a] juror who says he [or she] will never vote for the death penalty, no matter what the facts, is saying that he [or she] will not apply the law [which is] (the classic case of partiality)""); Witherspoon, 391 U.S. at 522 n.21 (excluding jurors who make it clear that they would never impose death penalty).
199. Morgan, 112 S. Ct. at 2241 (Scalia, J., dissenting) (stating that merciless juror is not lawless juror).
200. Id. at 2234. The Court stated, "[a]ny juror to whom mitigating factors are irrelevant ... should be disqualified for cause." Id. at 2235.
201. Id. at 2229.
the majority found that Illinois law simply requires a juror to consider the mitigating evidence and to consider whether the evidence is sufficient to preclude the death penalty.\textsuperscript{202} By contrast, the dissent would find that a juror under Illinois law does not have to conclude that any evidence is mitigating nor consider the evidence, if presented.\textsuperscript{203} The inconsistency in the dissent's reasoning is illustrated by the following comparison:

(1) Following the majority's analysis, the law would provide: A juror in the guilt phase of a trial who refuses even to consider the evidence presented will fail to follow the law. Likewise, a juror in the sentencing phase of a trial who refuses even to consider the mitigating evidence presented fails to follow the law.

(2) Following the dissent's analysis, the law would provide: A juror in the guilt phase of a trial who refuses even to consider the evidence presented will fail to follow the law. However, a juror in the sentencing phase of a trial who refuses even to consider the mitigating evidence presented does not fail to follow the law.

The language of the Illinois criminal statute directly contradicts the dissent's approach. The Illinois criminal statute provides: "[t]he court shall consider, or must instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty."\textsuperscript{204} The Morgan majority refused to ignore the plain language of Illinois law and in so doing formulated a rule that is consistent with the plain language.

While the Morgan Court attempted to equalize the rights of the state and the criminal defendant, the Court did not go far enough. Although the Morgan Court mandated exclusion of a juror who answers unequivocally that he or she automatically will impose the death penalty,\textsuperscript{205} the Court failed to address the situation in which the juror admits a substantial preference for imposition of the death penalty but does not state so unequivocally.\textsuperscript{206} Common sense indicates that a less equivocal response is inevitably more common than a response that indicates a juror always will impose the death penalty.

The Morgan Court could have placed greater reliance on Wainwright v. Witt\textsuperscript{207} and Adams v. Texas\textsuperscript{208} to decide this issue. These decisions allowed judges to exclude jurors who had "substantial" doubts about

\begin{footnotesize}
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\item \textsuperscript{202} Id.
\item \textsuperscript{203} Id. at 2237.
\item \textsuperscript{204} ILL. ANN. STAT. ch. 38, para. 9-1(c) (Smith-Hurd Supp. 1992).
\item \textsuperscript{205} Morgan, 112 S. Ct. at 2234. The Court stated that "jurors are not impartial if they would automatically vote for the death penalty." Id.
\item \textsuperscript{206} Id. at 2233.
\item \textsuperscript{207} 469 U.S. 412 (1985).
\item \textsuperscript{208} 448 U.S. 38 (1980).
\end{itemize}
\end{footnotesize}
imposing the death penalty. If the Morgan majority had provided specifically for exclusion of jurors who evidenced substantial doubts about their ability to grant a life sentence, then the Court would have created true equilibrium by excluding those with substantial doubts for and against imposition of the death penalty. A more appropriate ground for exclusion for cause should have been established under the Wainwright and Adams formula rather than the Witherspoon formula.

V. IMPACT

The Supreme Court's decision in Morgan provides criminal defense attorneys with a practical tool for uncovering juror bias and resolves existing confusion regarding the propriety of a "reverse-Witherspoon inquiry." The Morgan Court created a bright-line rule that requires courts to comply with defense counsel's requests to pose a "reverse-Witherspoon inquiry." This rule ensures that future defendants will have a jury void of jurors who believe that the death penalty is the only appropriate punishment for a guilty capital defendant.

However, Morgan does not ensure that a criminal defendant will have a truly impartial jury. Trial courts still retain broad discretion if a juror expresses substantial doubts about opposing the death pen-

209. See Wainwright, 469 U.S. at 424 (stating that standard for exclusion is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath"); Adams, 448 U.S. at 45 (1980) (noting 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"). For a discussion of the difference between the language in Witherspoon, which required a juror to state unequivocally that he would oppose the death penalty, and the language in Adams and Wainwright, which allowed exclusion of jurors whose views would substantially impair their ability to follow the law, see supra notes 70-92 and accompanying text.

210. For a discussion of Wainwright, see supra notes 81-92 and accompanying text. For a discussion of Adams, see supra notes 77-80 and accompanying text.

211. Witherspoon, 391 U.S. 510, 522 (excluding jurors whose views make it unmistakably clear that they could not impose death penalty under any circumstances). For a discussion of the facts and significance of Witherspoon, see supra notes 70-76 and accompanying text.

212. For a discussion of the confusion caused by Wainwright, see supra notes 81-92 and accompanying text.

213. Morgan, 112 S. Ct. at 2235 (stating that "[a] defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors" would automatically impose death).

214. Id. at 2229-30. The Morgan majority stated that "a capital defendant may challenge for cause any prospective juror who believes that the death penalty is the only appropriate punishment." Id.

215. For an in-depth discussion of why a jury selected under the Morgan analysis may still be partial, see supra notes 204-11 and accompanying text.
The Morgan Court did not specifically mandate exclusion of such jurors. By contrast, both Wainwright and Adams required a trial court to exclude a juror who has substantial doubts about imposing the death penalty. As a result, the prosecution still retains a slight advantage. Despite this noted distinction, the Morgan Court did provide a framework for ensuring a capital defendant's right to an impartial jury and laid foundation for future litigation on the constitutional limits of that right.

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217. Wainwright, 469 U.S. at 424 (recognizing that exclusion is appropriate where juror indicates that his or her views would substantially impair his or her performance as juror); Adams, 448 U.S. at 45 (stating that challenge for cause is not appropriate unless juror’s views would substantially impair his or her ability to follow law).

218. Morgan, 112 S. Ct. at 2233 (permitting defense counsel to request that juror be asked “reverse-Witherspoon inquiry”).