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Morgan v. Illinois: The Defense Gets the Reverse- Witherspoon Question

Thomas Joshua R. Archer

Morgan v. Illinois: The Defense Gets the Reverse-*Witherspoon* Question

I. INTRODUCTION

In *Morgan v. Illinois*[1] the United States Supreme Court settled the "reverse-*Witherspoon*"[2] question. The Court held that a trial court in a capital case must, upon the defendant's request, specifically inquire into a prospective juror's views on capital punishment and that a potential juror who would always vote for a sentence of death, regardless of the facts, must be struck for cause.[3] Further, the Court stated that the presence of even one partial juror on a defendant's panel offends the defendant's Fourteenth Amendment[4] right to a fair and impartial jury and the sentence may not stand.[5]

Before *Morgan*, trial courts often refused a defendant's request for a specific inquiry into whether any prospective jurors would always vote for the death penalty upon conviction of a capital crime. Trial judges maintained that a general question concerning the prospective juror's ability to follow the law sufficed to identify impartial jurors.[6] However, the Court held that such questions are inadequate.[7] When a trial court refuses the defendant's request for the specific question of a potential juror's vote on death sentences, the sentencing phase must be retried.[8]

II. THE CASE

According to Illinois state law, capital cases are tried in two phases.[9] The jury first decides whether the defendant is guilty of a capital offense.[10] Upon a finding of guilt, the same jury determines whether the

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1. 112 S. Ct. 2222 (1992).
2. *See* Witherspoon v. Illinois, 391 U.S. 510 (1968).
3. 112 S. Ct. at 2235.
4. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.")
5. 112 S. Ct. at 2234.
6. *Id.* at 2226.
7. *Id.* at 2232.
8. *Id.* at 2232-33.
9. ILL. REV. STAT. ch. 38, para. 9-1 (Supp. 1990).
10. *Id.* para. 9-1(g).

defendant should be sentenced to death.[11] In considering the sentence, the court instructs the jury that it must find unanimously,[12] beyond a reasonable doubt, that the defendant is eighteen years old and that at least one of ten enumerated aggravating factors exists.[13] If no aggravating factors are found, the defendant is imprisoned rather than sentenced to death.[14] However, if the jury finds the existence of one or more aggravating factors, the court instructs the jury to consider whether the defendant should be sentenced to death.[15] The court instructs the jury that when determining the defendant's sentence, the jury should consider mitigating factors, including but not limited to any of the five examples that the statute enumerates.[16]

A jury convicted Derrick Morgan of first degree murder and sentenced him to death. The State proved at trial that Morgan was a hired assassin. Morgan killed a drug dealer in an abandoned apartment during a gang war for turf.[17] Under Illinois law the trial court conducts voir dire.[18] The court required three separate venires before finding a satisfactory jury.[19] The State requested the *Witherspoon v. Illinois*[20] inquiry to determine whether any potential juror could not impose the death penalty regardless of the facts. The court agreed to the State's request and asked each venire whether any member had moral or religious principles so strong that he or she could not impose the death penalty regardless of the facts.[21] The trial court refused the defendant's request to inquire, "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts [of the case were]?"[22] The trial court stated that its question, "Would you follow my instructions on the law, even though you may not agree?" reached substantially the same information.[23] The court did not ask three venirepersons the question.[24] The court did ask every impaneled juror if each could be fair and impartial. The fair and impartial line of questions led to the striking of one

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11. *Id.*
12. *Id.* para. 9-1(f).
13. *Id.* para. 9-1(b). *See, e.g., Id.* para. 9-1(b)(5) (murder for hire or by contract); *Id.* para. 9-1(b)(10) (premeditated murder by preconsidered plan).
14. *Id.* para. 9-1(g).
15. *Id.*
16. *Id.* para. 9-1(c).
17. 112 S. Ct. at 2226.
18. *See* People v. Gacy, 468 N.E.2d 1171, 1184-85 (Ill. 1984).
19. 112 S. Ct. at 2226.
20. 391 U.S. 510 (1968).
21. 112 S. Ct. at 2226.
22. *Id.*
23. *Id.*
24. *Id.*

prospective juror who answered that he would always vote for the death penalty because of a past experience.[25]

The Illinois Supreme Court rejected Morgan's claim that the trial court's voir dire must include a question directly inquiring whether a potential juror would always vote for the death penalty.[26] The Supreme Court granted certiorari because of the extreme confusion concerning the requirement of the "life-qualifying" inquiry.[27]

III. THE COURT'S OPINION

Justice White, writing for the Court, first stated that "no state is constitutionally required by the Sixth Amendment[28] or otherwise to provide for jury determination of whether the death penalty shall be imposed on a capital defendant,"[29] but a state that so chooses must provide a jury for sentencing that meets constitutional standards.[30] The Court addressed four different issues in deciding whether a trial court must, upon request by a capital defendant, ask potential jurors whether any venireperson would always vote to impose the death penalty on a person convicted of a capital offense regardless of the facts.[31]

A. Jury at the Sentencing Phase

The Court first addressed the issue of whether a jury provided to a capital defendant at the sentencing phase must be impartial.[32] Justice White analyzed this issue under the *Turner v. Louisiana*[33] rule that the Due Process Clause of the Fourteenth Amendment[34] requires that any jury impaneled to try a cause must be impartial.[35] Therefore, although the Constitution does not require that a state provide a capital defendant with a separate sentencing trial, if the state provides a jury for the sen-

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25. *Id.* at 2227 n.2.

26. People v. Morgan, 568 N.E.2d 755 (Ill. 1991).

27. Morgan v. Illinois, 112 S. Ct. 295 (1991).

28. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .").

29. 112 S. Ct. at 2228.

30. *Id.*

31. *Id.*

32. *Id.*

33. 379 U.S. 466 (1965).

34. U.S. CONST. amend. XIV.

35. 379 U.S. at 471.

tencing, the Sixth Amendment,[36] through the Fourteenth Amendment,[37] requires that the jury be impartial.[38]

B. *The Constitutionality of a Death Only Juror*

Next, the Court determined whether the Constitution entitles a capital defendant to challenge for cause, and have removed on the ground of bias, a prospective juror who will automatically vote for the death penalty irrespective of the facts or the trial court's instruction of law.[39] First, the Court defined an impartial juror. The Court relied on *Adams v. Texas*,[40] *Wainwright v. Witt*,[41] and *Ross v. Oklahoma*.[42] Justice White explained that the Court in *Witt* held that a court must determine "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.' "[43] A juror who would never vote for the death penalty in a capital case is not an impartial juror.[44] A juror unable to vote for the death penalty cannot follow the laws of the state and must be struck for cause. The Court discussed and distinguished its opinion in *Ross*, which dealt with a potential juror who answered that he would always vote for the death penalty.[45] In *Ross* the trial court refused to strike the juror for cause, and the defendant had to use a peremptory strike to exclude the potential juror.[46] The Court in *Ross* emphasized that "[h]ad [this juror been sitting] 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."[47] Here, the trial court did not ask the defendant's requested question—whether any juror would always vote for the death penalty?[48] A juror who would always vote for the death penalty has already formed an opinion concerning the defendant's sentence, and aggravating and mitigating circumstances are irrelevant.[49] The Court stated that a capital de-

36. U.S. CONST. amend. VI.
37. *Id.* amend. XIV.
38. 112 S. Ct. at 2229.
39. *Id.*
40. 448 U.S. 38 (1980).
41. 469 U.S. 412 (1985).
42. 487 U.S. 81 (1988).
43. 112 S. Ct. at 2229 (quoting 469 U.S. at 424 (quoting 448 U.S. at 45)).
44. *Id.*
45. *Id.*
46. 487 U.S. at 83-85.
47. *Id.* at 85.
48. 112 S. Ct. at 2226.
49. *Id.* at 2229.

fendant may challenge for cause a "death always" juror.[50] Further, if even one such juror sits on the defendant's jury, and the jury votes for the death penalty, the state may not execute the defendant and must re-try the sentencing.[51]

C. *Requirement of the Direct Inquiry*

Illinois did not challenge the Court's determinations of the first two issues.[52] However, Illinois argued that the trial court may refuse a direct inquiry into the prospective juror's views and satisfy constitutional standards with a more general question.[53] The Court determined whether, on the defendant's request, the trial court must directly inquire into the prospective juror's views on the death penalty at voir dire.[54] The Court stated the general principle that the trial court has great discretion in its conduct of voir dire, but the trial court must allow the defendant the ability to identify biased jurors.[55] Although the trial court should have great deference, when the Court must determine whether the voir dire meets the standards set by the Constitution, the Court will not hesitate to review.[56]

"The principles first propounded in *Witherspoon v. Illinois*,[57] the reverse of which are at issue here, demand inquiry into whether the views of prospective jurors on the death penalty would disqualify them from sitting."[58] The Court in *Witherspoon* held that a juror who expressed a hesitancy to vote for the death penalty could not be struck for cause, but a juror who would never vote for the death penalty may be struck for cause.[59] In *Witt* the Court stated that it is the State's burden to demonstrate through questioning that a prospective juror holds an opinion against the death penalty.[60] The Court in *Lockhart v. McCree*[61] held that the only way the State will be able to satisfy its burden is to inquire directly into the prospective juror's opinion during voir dire.[62] Therefore, if the trial court prevents the defendant from using voir dire to "lay bare

50. *Id.* at 2229-30.
51. *Id.* at 2230.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. 391 U.S. 510 (1968).
58. 112 S. Ct. at 2230-31.
59. 391 U.S. at 519.
60. 469 U.S. at 423.
61. 476 U.S. 162 (1988).
62. *Id.* at 170.

the foundation"[63] of the defendant's challenge for cause against a prospective juror, the defendant's constitutional right to an impartial jury would be rendered as "meaningless as the State's right, in the absence of questioning, to strike those (jurors) who would never do so."[64] The Court held that the trial court must grant the defendant a voir dire that sufficiently probes the views of prospective jurors.[65]

D. The General Question

Illinois next argued that even if the Constitution grants the defendant an inquiry into the views of prospective jurors, the trial court judge's questions to the prospective jurors regarding the general ability of the jurors to follow the laws of the State satisfied the constitutional standard.[66] The Court disagreed, finding general "follow the law"[67] questions inadequate to determine whether any prospective jurors might always vote for the death penalty regardless of the facts.[68] The Court stated that if it accepted such general questions as adequate for determining the possible biases of prospective jurors, it would render *Witherspoon* and its succeeding cases useless.[69]

The Court held that such general questions are inadequate devices to discover those jurors who might have views that would impair their ability to follow the law.[70] Jurors could truthfully answer that they would follow the law without knowing that their views prevent them from following the law.[71] A juror who will not consider mitigating and aggravating factors fails to follow Illinois law.[72] The Court noted that it is reasonable for a juror to believe that she may be impartial and fair with the view that anyone convicted of a capital crime should always be sentenced to death.[73] Illinois law does not state that everyone convicted of a capital crime must be sentenced to death.[74] The statute provides for death penalty only for those capital defendants who the jury decides deserve a death sentence after considering aggravating and mitigating factors.[75] The Court stated that the defendant must be given the opportunity to deter-

63. 112 S. Ct. at 2232.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 2233.
70. *Id.*
71. *Id.*
72. *Id.*
73. *See id.* at 2233 n.9.
74. *Id.* at 2226.
75. *See supra* notes 11-12 and accompanying text.

mine whether any jurors function under the misconception that one may hold the view that all capital defendants must be sentenced to death and remain fair and impartial.[76]

Illinois further argued, as did Justice Scalia in his dissent,[77] that because Illinois law requires a unanimous vote to sentence a defendant to death,[78] the "reverse-*Witherspoon*" is "inapposite"[79] to *Witherspoon*.[80] One juror who would always vote against the death penalty can prevent a jury from issuing a death sentence, one juror who would always vote for the death penalty cannot force an entire jury to support unanimously that decision.[81] The Court stated that *Ross*[82] clearly answered this argument. The Court in *Ross* stated that the presence of even one impartial juror poisons the entire jury.[83] Justice White explained that the Court investigates the presence of interfering biases in each individual juror rather than the jury as a whole.[84]

The Court held that the only way to make clear to the prospective jurors that one who holds a "death always" view cannot follow the law is to question directly the prospective juror concerning her views on the death penalty.[85] Failure to do so after the defendant has requested the question taints the entire jury.[86] A state may not execute a defendant tried by a jury that in its composition has even one juror who the trial court, at the defendant's request, did not ask if she would always vote for the death penalty for a capital defendant, regardless of the facts.[87]

E. The Dissent

Finally, the Court addressed Justice Scalia's dissent.[88] Justice Scalia argued that jurors who will always vote for the death penalty are not biased because Illinois law does not "preclude a juror from taking the view that, for capital murder, a death sentence is always warranted."[89] However, the Court stated that such a juror automatically finds mitigating factors irrel-

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76. 112 S. Ct. at 2233.
77. *Id.* at 2235 (Scalia, J., dissenting).
78. *Id.* at 2232 n.8.
79. *Id.*
80. 391 U.S. 510 (1968).
81. *Id.*
82. 487 U.S. 81 (1988).
83. *Id.* at 85.
84. 112 S. Ct. at 2232 n.8.
85. *Id.* at 2233.
86. *Id.* at 2234.
87. *Id.*
88. *Id.* at 2235 (Scalia, J., dissenting).
89. *Id.* at 2222, 2237 (Scalia, J., dissenting).

evant and are effectively saying that mitigating evidence is not even worth their consideration.[90]

The Court first noted that Justice Scalia has a "jaundiced view"[91] of the Court's line of cases from *Woodson v. North Carolina*[92] through *Sochor v. Florida*[93] concerning the "nature and role of mitigating evidence in the trial of capital offenses."[94] In that line of cases the Court found that the Constitution does not require consideration of aggravating and mitigating factors, but if the state chooses to consider the factors, the consideration must meet Constitutional standards.[95] Even more important to the Court was the fact that Justice Scalia's opinion finds no support in either the statutory or decisional law of Illinois.[96] The relevant Illinois statute states that "[t]he court shall consider or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty."[97] In addition, the Illinois statute indicates that lesser penalties exist for capital defendants who the jury deems should not be sentenced to death.[98] The Court stated that any juror who would always vote for the death penalty upon conviction of the defendant cannot have based such a decision on all of the evidence.[99] The Court further supported its holding against Justice Scalia's dissent by stating that in the situation when a capital defendant elects to be sentenced by a judge instead of a jury,[100] a judge who states before the trial that she deems aggravating and mitigating factors irrelevant must disqualify herself from the case.[101]

IV. ANALYSIS

The Court in *Morgan* provides the death penalty voir dire with proper balance and symmetry. Illinois recognized the Court's desire to balance its decisions regarding criminal procedure by arguing that the "reverse-*Witherspoon*" question is "inapposite" to the *Witherspoon* question.[102] The State argued that a juror who will always vote for the death penalty

90. *Id.*
91. *Id.* at 2233.
92. 428 U.S. 280 (1976).
93. 112 S. Ct. 2114 (1992).
94. 112 S. Ct. at 2234.
95. *Id.*
96. *Id.* at 2233-34.
97. ILL. REV. STAT. ch. 38, para. 9-1(c) (Supp. 1990).
98. *Id.* para. 9-1(g).
99. 112 S. Ct. at 2234.
100. *Id.* at 1112 n.1.
101. *Id.* at 2235.
102. *Id.* at 2232 n.8.

does not impact the jury's decision with the same force that a juror who will never vote for the death penalty impacts the jury.[103] Although the argument failed, it recognizes the current Court's approach to criminal procedure cases. Future criminal procedure arguments before this Court should attempt to frame issues as questions of symmetry.

In a line of cases similar to *Witherspoon* and *Morgan* the Court provided symmetry in peremptory strikes. In a 1986 case, *Batson v. Kentucky*,[104] the Court held that a defendant may challenge the prosecution's use of peremptory strikes against black venirepersons. In *Georgia v. McCollum*[105] the Court held that the prosecution must have the "reverse-*Batson*" challenge when the defense uses peremptory strikes against black venirepersons.[106] The Court provided further balance by extending the *Batson* challenges to the civil forum in *Edmonson v. Leesville Concrete Co.*[107] The decision in *Morgan* follows the Court's symmetrical approach to legal procedure.

The Court properly recognized the importance of detailed voir dire in fulfilling the defendant's right to have a jury free from persons who will always vote for the death penalty.[108] The Court explained that it is likely that a venireperson might not understand that a person who will always vote for the death penalty cannot be impartial and fair.[109] As the Court noted,[110] a prospective juror might not truly understand that her views prevent her from being impartial and only in depth questioning during voir dire will expose the venireperson's impartiality.[111] The Court shows its sensitivity to the reality of voir dire by stating that a general "follow the law" question from the judge falls far short of determining the prospective juror's true views.[112] The Court's recognition of the import of extensive voir dire to effectuate constitutional rights should be used as authority in situations when prosecutors or defense lawyers ask for more extensive voir dire.

Finally, the decision in *Morgan* may open the door for a flood of future federal habeas reviews. If the *Morgan* rule is retroactive, many prisoners on death row whose "*Morgan*" questions were denied by the trial court may be able to have their sentences reversed and retried. Whether the *Morgan* rule fits within one of the two exceptions in the *Teague v.*

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103. *Id.*
104. 476 U.S. 79 (1986).
105. 112 S. Ct. 2348 (1992).
106. *Id.*
107. 111 S. Ct. 2077 (1991).
108. *Id.* at 2233.
109. *Id.*
110. *Id.* at 2233 n.9.
111. *Id.*
112. *Id.* at 2233.

Lane[113] rule for retroactivity is subject for a more extensive project. The *Morgan* rule might be considered a new rule because the result "was not *dictated* by precedent existing at the time the defendant's conviction became final."[114] However, the Court confused this exception in *Butler v. McKellar*[115] making the retroactivity inquiry difficult "where the Court's decision is reached by an extension of the reasoning of previous cases . . . ."[116] If *Morgan* is a new rule that applies retroactively not only will many death row inmates have federal habeas reviews for cases when the specific inquiry was denied, but some, because the request is standard, may have claims for inadequate counsel if the defense attorney failed to request the question.

V. CONCLUSION

The Court in *Morgan* provides a proper balance for *Witherspoon v. Illinois*.[117] Both the defense and the prosecution will now have the ability to directly inquire into each venireperson's views concerning the death penalty. Prospective jurors who occupy the most severe ends of the death penalty spectrum will not be allowed to sit on the jury. The laws concerning the death penalty will hopefully be more accurately effected by striking biased jurors on the farthest ends of the death penalty issue.

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113. 489 U.S. 288 (1989). (Holding that new rules are generally not retroactive unless the rule places certain individual conduct beyond the authority of the state to control or the new rule requires observance of procedure that is "implicit in the concept of ordered liberty.")

114. *Id.* at 301.

115. 494 U.S. 407 (1990).

116. John Blume & William Pratt, *The Changing Face of Retroactivity*, 58 UMKC L. REV. 581, 589 (1990).

117. 391 U.S. 510 (1968).