Capital Defense Journal

Volume 5 | Issue 1 Article 3

Fall 9-1-1992

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United States Supreme Court

FACTS

Derrick Morgan was convicted in Cook County, Illinois, of the first degree murder of a narcotics dealer (murder for hire) and sentenced to death.

In Illinois, as in Virginia, a capital offense trial is conducted in two phases, with the same jury that determines guilt also determining whether the death penalty should be imposed. During the voir dire conducted by the trial court, the State requested that the court question prospective jurors as to whether they would automatically vote against the death penalty regardless of the facts of the case, relying on *Witherspoon v. Illinois*.[1] The court granted the State's request and asked each prospective juror the *Witherspoon* question. In response to such questioning and over opposition from the defense, seventeen jurors were excused when they expressed substantial doubt about their ability to follow the law concerning the imposition of the death penalty.

After seven members of the first venire had been questioned, defense counsel requested that the court ask prospective jurors a "reverse-*Witherspoon*" or life-qualifying question: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" The court denied Morgan's request, stating that the same information was being sought through more general questions, such as, "Would you follow my instructions on the law, even though you may not agree?" While not all of the jurors were asked this question, all of the jurors who eventually were impaneled were questioned generally about their ability to be fair and impartial.

After his conviction, Morgan appealed, citing *Ross v. Oklahoma*[2] for the proposition that voir dire "must include the 'life qualifying' or 'reverse-*Witherspoon*' question upon request." The Illinois Supreme Court affirmed Morgan's conviction, finding that a trial court is not required to include the reverse-*Witherspoon* or life-qualifying question upon request of counsel.[3] In so doing, the court rejected the *Ross v. Oklahoma* argument, finding that Morgan's jury "was selected from a fair cross-section of the community, [that] each juror swore to uphold the law regardless of his or her personal feelings, and [that] no juror expressed any views that would call his or her impartiality into question."[4]

Morgan appealed to the United States Supreme Court on the reverse-*Witherspoon* issue.

HOLDING

The Supreme Court reversed the decision of the Illinois Supreme Court, citing the Due Process Clause of the Fourteenth Amendment and Sixth Amendment guarantees of an impartial and indifferent jury.[5] The Court noted that a juror who would automatically vote for the death penalty would fail to consider the aggravating and mitigating factors as required by Illinois law and thus act "lawlessly" under the statute.[6] Thus, to ensure the impartiality of the jurors and the meaningful use of Morgan's challenges for cause, the Court held that jurors should have been questioned on their ability to consider all the evidence before imposing the death penalty.[7]

ANALYSIS/APPLICATION IN VIRGINIA

I. The Source of the Right

In a six to three decision written by Justice White, the Court strongly reaffirmed a defendant's right to an impartial jury at both the guilt and sentencing phases of the trial.[8] In the context of capital sentencing, the right may require that a juror be excused for cause because of his or her views on capital punishment. The Court noted, for example, that it previously had held such dismissal can occur when a "juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"[9] Therefore, a juror who would never vote for capital punishment is not impartial and must be removed for cause. Similarly, the Court reasoned, a juror who would vote automatically to impose death would also have to be removed, because such a juror already has made up his or her mind on the merits, thereby making the statutory scheme of considering aggravating and mitigating factors irrelevant. Indeed, the Court found that if even one such juror should make it onto a jury panel that subsequently imposed the death sentence, the State would be "disentitled to execute the sentence."[10] Virginia practitioners will want to note the Court's strong language in support of the impartiality of jurors. Such language will provide ample foundation for a forceful memorandum of law in support of reverse-*Witherspoon* questioning (see discussion below).

Reviewing *Witherspoon* (limiting a state's power to exclude all jurors hesitant to impose death), *Witt* (allowing the state to exclude jurors whose views would impair their ability to follow instructions) and *Lockhart v. McCree*[11] (allowing the state to identify jurors whose views would impair their ability to follow instructions), the Court once again stressed that it is through **questioning** that the impartial juror is discovered. While the cases cited above deal largely with prosecutorial questioning, the *Morgan* Court extended such language to the defense. The Court recognized that the defendant also has challenges to ensure impartiality and that if a defendant were not able to question in order to discover those jurors "who would always impose death after conviction, his right not to be tried by such jurors would be rendered... nugatory."[12] In sum, the Court concluded that "the extremes must be eliminated."[13]

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1 *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

2 *Ross v. Oklahoma*, 487 U.S. 81 (1988). *See* case summary of *Ross*, Capital Defense Digest, Vol. 1, No. 1, p. 18 (1988).

3 *People v. Morgan*, 142 Ill.2d 410, 470, 568 N.E.2d 755, 778 (Ill. 1991).

4 *Id.*, 568 N.E.2d at 779. Subsequently, the Illinois Supreme Court has emphasized that its decision in *Morgan* was not a ban on reverse-*Witherspoon* questioning, but a recognition that other procedures can work to ensure the same fairness. *People v. Jackson*, 145 Ill.2d 43, 110, 582 N.E.2d 125, 126 (Ill. 1991).

5 *Morgan v. Illinois*, 112 S.Ct. 2222, 2235 (1992).

6 *Id.* at 2232-33.

7 *Id.* at 2230.

8 *Duncan v. Louisiana*, 391 U.S. 145 (1968) (the Fourteenth Amendment guarantees a jury trial in all state criminal cases that, if tried in federal court, would come under the Sixth Amendment provisions for jury trial); *Irvin v. Dowd*, 366 U.S. 717 (1961); and *Turner v. Louisiana*, 379 U.S. 466 (1965) (impartiality required of any jury under the Fourteenth Amendment's Due Process Clause).

9 *Morgan*, 112 S. Ct. at 2229 (quoting *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)).

10 *Morgan*, 112 S. Ct. at 2230.

11 476 U.S. 162 (1978).

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

13 *Id.* at 2232, n.7 (citing *Smith v. Balkcom*, 660 F.2d 573, 578 (5th Cir. 1981)).

II. The Scope of the Right and Sufficiency of General Questioning

In *Morgan*, Illinois had relied on the general fairness and "following the law" questions as being sufficient to determine the impartiality of jurors.[14] Illinois also tried to argue that, in light of the unanimous verdict requirement to impose death, the impact of seating a juror who would always vote for death would be slight.[15]

In response, the majority emphasized that the State's own requests under *Witherspoon* and *Witt* belied the sufficiency of general questioning. After all, the State's *Witherspoon* questions also would be superfluous if general questions could ferret out jurors unable to perform their duties impartially. More importantly, the Court stressed that because jurors may not understand what capital sentencing requires, they might affirmatively answer that they could obey the law without being aware of their **misconceptions** about the law or the impact of their beliefs regarding capital punishment. The possibility of jurors believing they are answering honestly that they can follow the law, when in fact they could not, would seem particularly true when it came to considering certain evidence as mitigating and the ability to weigh aggravating and mitigating factors.

Morgan, for example, would appear to require that courts allow voir dire of each juror's ability to consider particular mitigating factors. More than simply allowing the question, "Would you always impose the death penalty?," defense attorneys should pursue fact-specific questions about whether each juror would be "substantially impaired" from considering each piece of mitigating evidence that the defendant intends to introduce. Arguably, then, if a venire person stated that he or she could not, for example, consider a defendant's "abusive childhood" or an "inability to conform one's actions" as mitigating evidence, he or she could not sit on the jury.

Parole is another area rife with jury misconceptions that *Morgan* might give defense counsel a chance to examine. In their article *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*,[16] Paduano and Smith report research which found that the typical juror understands a "life" sentence to be more of a "get out of jail free card" than a punishment. Further, believing that the defendant will never actually be put to death, the jurors feel that a death penalty would at least ensure some adequate jail time before appellate reversal of the conviction. In addition to the general findings, the Paduano/Smith article also provides startling statistics that would make persuasive additions to a memorandum of law on juror misperceptions regarding parole. For instance, the authors cite one study showing that 75 percent of registered voters (the jury pool) questioned felt that a death sentence would be reversed upon appeal. Nearly 70 percent felt it was unlikely that a person sentenced to death would ever actually be executed. Finally, the majority of those questioned thought the average person sentenced to life imprisionment for murder would only serve seven years. While currently Virginia restricts arguments or evidence on parole,[17] the Paduano/Smith article and the *Morgan* Court's emphasis on exploring juror misperceptions may open opportunities for questioning jurors about their understanding of parole.

Although Justice Scalia strongly dissented on a variety of grounds,[18] his dissent may actually help form the argument for an expansive use of *Morgan*. For instance, Justice Scalia found as a logical consequence of the majority opinion that the Court in the future must "implicitly establish[] that the jurors must find some mitigation."[19] Further, from Justice Scalia's statement that "it is impossible in principle to distinguish between a juror who does not believe that **any** factor can be mitigating from one who believes that a **particular** fact. . . is not mitigating,"[20] it could be concluded that any juror who finds one of the mitigating factors unacceptable or unusable would have to be excluded. Finally, Justice Scalia's interpretation of the majority opinion on the subject of mercy may provide some compelling quotes for defense counsel wanting to argue a broad interpretation of *Morgan*.[21]

After *Morgan*, voir dire on the reverse-*Witherspoon* (or life qualifying) questions of a juror's inability to consider a life sentence is constitutionally required **upon request**. While the *Morgan* court seems to expand the range of subjects open to defense questioning, actual practice and additional case law will clarify those points. Virginia attorneys may want to approach voir dire armed with a memorandum of law based on *Morgan*. Once prepared, attorneys will want to ask reverse-*Witherspoon* questions of the jury, presenting the memo when stopped. Such questions may maintain the form of other jury questions,[22] adding, however, the relevant mitigating factors for the defendant in the particular case. Adequate voir dire is part of Fourteenth Amendment Due Process, and where there is any potential of misperception and a vital interest at stake, defendant's counsel must be given permission to pursue it.

Summary and analysis by:
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14 *People v. Morgan*, 142 Ill.2d at 470, 568 N.E.2d at 778.

15 *Morgan*, 112 S. Ct. at 2232, n.8 ("'Persons automatically for the death penalty would still need to persuade the remaining jurors to vote **for** the death penalty.'") (quoting Brief for Respondent at 27) (emphasis in original). Justice Scalia championed this argument in his dissent.

16 Paduano and Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211 (Spring 1987).

17 *Clanton v. Commonwealth*, 223 Va. 41, 286 S.E.2d 172 (1972).

18 In his dissent, Justice Scalia applauded the use of the general "ability to follow the law" questioning found by the majority to be insufficient. He also discounted the impact of any juror who will fail in good faith to consider mitigating factors, selecting instead death. Finally, he speculated on what he sees as the far-reaching and adverse effects of the majority's decision. *Morgan*, 112 S. Ct. at 2241 (Scalia, J., dissenting).

19 *Id.* at 2237, n.2.

20 *Id.* at 2237, n.3 (emphasis in original).

21 *Id.* at 2241 ("The Court has, in effect, now added the **new** rule that no merciless jurors can sit"); *Id.* at 2242 ("[T]he People . . . cannot decree the death penalty, absolutely and categorically, for **any** criminal act, even (presumably) genocide; the jury must always be given the option of extending mercy . . . . Not only must mercy be allowed, but now only the merciful may be permitted to sit in judgment") (emphasis in original).

22 Although questions phrased as "Do you personally believe . . . ," "As you sit there today, do you feel you could . . . ," and "The job of determining . . . " were once reserved for investigating attitudes on witness credibility and the criminal justice system, after *Morgan* they become available for reverse-*Witherspoon* questioning. For instance, a defense attorney might ask, "Do you personally believe that emotional disturbance can serve as a mitigating factor to a violent crime?" "As you sit there today, do you feel you could impose a death sentence on a defendant with no significant history of prior criminal activity?"