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*Morgan v. Illinois*: The Supreme Court Supports the Right of a Capital Defendant to an Impartial Sentencing Jury

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I. INTRODUCTION

On June 15, 1992, the United States Supreme Court decided *Morgan v. Illinois*. In a six-to-three decision, the Court held that the Due Process Clause of the Fourteenth Amendment grants capital defendants the right to question prospective sentencing jurors on their propensity to vote in favor of capital punishment. The Court also ruled that capital sentencing jurors who intend to vote automatically for a death sentence upon conviction of a defendant cannot be impartial, as due process requires.

Despite a forceful dissent and heretofore limited recognition of rights to specific *voir dire* inquiries, the *Morgan* Court reached a conclusion dictated by fundamental fairness: capital defendants must have effective means of detecting and excluding the most seriously partial of prospective capital sentencing jurors—those who would impose the death penalty on any person convicted of a capi-
tal crime. In doing so, the Court expanded the due process rights of capital defendants.

This Note first reviews the constitutional aspects of capital sentencing, the elements of the *voir dire* process, and the trial court's power to shape *voir dire*. The Note also traces the Court's prior rulings on challenges for cause based on the death-penalty beliefs of prospective capital sentencing jurors, and examines the Illinois death penalty statute. The Note then summarizes the facts of *Morgan* and analyzes its majority and dissenting opinions. Next, the impact of the *Morgan* ruling is explored. Finally, this Note concludes that *Morgan* is a sound affirmation of the capital defendant's due process rights.

II. BACKGROUND

A. The Constitution and Capital Sentencing

The Constitution does not require capital sentencing to be conducted by jury. The Supreme Court has held that if a jury is used, however, the Due Process Clause of the Fourteenth Amendment requires that it meet the impartiality standard of the Sixth Amendment. Further, the Court has also held that for all but the rarest of cases, the Eighth Amendment prohibits mandatory capital sentencing and guarantees capital defendants the right to present mitigating evidence to the sentencing judge or jury.

7. See infra parts II.A and B.
8. See infra parts II.C and D.
9. See infra part III.
10. See infra parts IV and V.
12. *Morgan*, 112 S. Ct. at 2229. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI. The Sixth Amendment guarantees criminal defendants an impartial guilt-determining jury but does not apply directly to capital sentencing juries. *Morgan*, 112 S. Ct. at 2229. However, the Fourteenth Amendment Due Process Clause independently requires that a capital sentencing jury meet an impartiality standard equivalent to that of the Sixth Amendment. Id. (citing *Turner* v. Louisiana, 379 U.S. 466, 472 (1965)).
13. The Eighth Amendment prohibits "cruel and unusual punishments." U.S. CONST. amend. VIII.
14. *Lockett* v. Ohio, 438 U.S. 586, 600-01, 604 (1978). In *Lockett*, the Court stated: "The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the cir-
B. Voir Dire

During *voir dire*, the trial judge, counsel, or both\(^{15}\) question prospective jurors on their personal beliefs and knowledge.\(^{16}\) Counsel may then attempt to exclude from the jury persons who have expressed views unfavorable to their case.\(^{17}\) This is accomplished through discretionary but numerically limited peremptory challenges or through judge-approved challenges for cause.\(^{18}\)

Venirepersons\(^{19}\) may be excluded for cause if they possess a bias that would prevent them from serving impartially as jurors. Statutes and court decisions commonly specify the grounds that justify exclusion for cause.\(^{20}\) In a given case, the trial judge ultimately decides if a challenged person’s responses form a proper basis for exclusion,\(^{21}\) and an unlimited number of prospective jurors may be excluded for cause.\(^{22}\) The trial court’s ruling on a challenge for cause may ordinarily be reversed only for manifest error.\(^{23}\)

The trial court typically enjoys broad discretion in controlling the questions posed to prospective jurors in *voir dire*.\(^{24}\) State courts are required to grant defendants’ requests for specific inquiries only

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\(^{15}\) Wayne R. LaFave & Jerold H. Israel, Criminal Procedure, § 21.3(a), at 722 (2d ed. 1992) [hereinafter LaFave, Crim. Proc.].

\(^{16}\) Id. § 21.3(a), at 718.

\(^{17}\) Id.

\(^{18}\) Id.

\(^{19}\) Id.


\(^{21}\) LaFave and Israel provide the following example, taken from the ALI Code of Criminal Procedure and used as a model by many states: “That the juror has a state of mind in reference to the cause or to the defendant or to the person alleged to have been injured by the offense charged, or to the person on whose complaint the prosecution was instituted, which will prevent him from acting with impartiality . . . .” LaFave, Crim. Proc., supra note 15, § 21.3(c), at 728-29.


\(^{23}\) The U.S. Supreme Court has defined proper grounds for challenge for cause as “narrowly specified, provable, and legally cognizable bases of partiality.” Swain v. Alabama, 380 U.S. 202, 220 (1965).

\(^{24}\) LaFave, Crim. Proc., supra note 15, § 21.3(a), at 718; Wainwright v. Witt, 469 U.S. 412, 423 (1985) (stating that “[i]t is then the trial judge’s duty to determine whether the challenge is proper”).
if due process demands it.\textsuperscript{25} The Court has stated that refusing a requested inquiry violates due process when it renders a trial "fundamentally unfair."\textsuperscript{26} Before \textit{Morgan}, the Court recognized due process rights only to questions regarding racial or ethnic prejudice, and then only in cases in which it was substantially probable that such prejudice might influence the jury.\textsuperscript{27} Emphasizing the singularly grievous consequence of an erroneously imposed capital sentence, the Court has ruled that in cases involving interracial capital crimes defendants must be allowed to probe prospective jurors for racial bias.\textsuperscript{28} In instances in which it has recognized rights to defendant-requested \textit{voir dire} inquiries, the Court has also qualified that recognition: the trial judge must cover the subject of the request, but the judge retains control over the exact content and number of questions asked.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{25} \textit{Mu'Min}, 111 S. Ct at 1903-04. The Court's supervisory powers allow it to hold federal courts to a higher standard. \textit{Id.} For a discussion of the Court's use of its supervisory powers, see \textit{Lafave, Crim. Proc., supra} note 15, § 21.3(a), at 719.
\item \textsuperscript{26} \textit{Mu'Min}, 111 S. Ct. at 1905.
\item \textsuperscript{27} \textit{Lafave, Crim. Proc., supra} note 15, § 21.3(a), at 719-23. The Court's decisions in this area, however, are not entirely consistent. \textit{Id.}
\end{itemize}

In Ham v. South Carolina, 409 U.S. 524, 525, 527 (1973), the Court held that an African-American civil rights worker who alleged that he had been "framed" for marijuana possession in retaliation for his activities was entitled by due process to ask specific questions with regard to racial bias. However, shortly afterward, the Court ruled against a defendant whose claim of entitlement to a racial bias inquiry centered on the fact that he, an African-American, was accused of violently assaulting a white victim. Ristaino v. Ross, 424 U.S. 589, 590, 597-98 (1976). The \textit{Ristaino} Court suggested that allowing an inquiry on racial bias is required by due process only in cases in which racial issues are "inextricably bound up with the conduct of the trial." 424 U.S. at 597; see also Rosales-Lopez v. United States, 451 U.S. 182, 190-91 (1981) (endorsing this principle and the result reached in \textit{Ristaino}). The Court found that these circumstances were not present in \textit{Ristaino}. 424 U.S. at 597.

The \textit{Ristaino} Court noted, however, that if \textit{Ristaino} had been a federal case, the Court would have used its supervisory powers to allow the defendant the inquiry he requested. \textit{Ristaino}, 424 U.S. at 598 n.9. In \textit{Rosales-Lopez}, 451 U.S. at 192, the Court further detailed this position by construing \textit{Ristaino} and \textit{Aldridge} v. United States, 283 U.S. 308 (1931), to conclude that "federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups."

In the recent \textit{Mu'Min} decision, the Court held five-to-four that due process was not violated when a trial judge, who \textit{had} questioned venirepersons on the subject of pretrial publicity in a capital case, refused the defendant's request for \textit{specified} questions on the exact content of the publicity to which the venirepersons had been exposed. 111 S. Ct. at 1908. The Court determined that due process did not require a judge to pose the exact questions requested. \textit{Id.}

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\item \textsuperscript{28} Turner v. Murray, 476 U.S. 28, 35-37 (1986).
\item \textsuperscript{29} "[T]he trial judge retains discretion as to the form and number of questions on the subject . . . ." \textit{Turner}, 476 U.S. at 36-37 (citing \textit{Ham}, 409 U.S. at 527).
\end{itemize}
C. Challenges for Cause Based on Death Sentence Bias

The Morgan decision extends a line of Court decisions that have ruled on the state's power to exclude prospective capital sentencing jurors who oppose the death penalty. In those cases, the Court confronted the polarized self-interests that are at work in capital case voir dire. Prosecutors seeking the death penalty naturally try to keep persons opposed to or uncertain about capital punishment off the jury and try instead to load the jury with death penalty advocates. Capital defendants, of course, want a sentencing jury stacked with death penalty opponents. Moreover, defendants and prosecutors must strive to select favorable jurors from a pool of individuals with varying beliefs about capital punishment.

Against this backdrop, in the pre-Morgan decisions the Court attempted to identify the anti-death-penalty bias that would make a prospective sentencing juror partial and therefore subject to exclusion for cause. In Witherspoon v. Illinois, for example, the prosecutor relied on an Illinois statute that allowed the State to exclude for cause venirepersons who expressed scruples against imposing capital punishment. The prosecutor thereby excluded forty-seven venirepersons, nearly one-half of the prospective jurors, on the basis of their death penalty views. Only five of those who were excluded had expressed an absolute unwillingness to vote for a death sentence; the remainder had voiced a more general opposition to the death penalty, based on principle. The jury thus selected convicted the defendant and imposed a death sentence.

On review, the Court found that the grounds for challenge used
by the Illinois prosecutor had produced a jury "uncommonly willing to condemn a man to die." The Court held that a capital sentencing jury is not impartial, as required by the Sixth and Fourteenth Amendments, if the state systematically excludes prospective jurors who express no more than general objections to the death penalty. The Court added, however, that it would not prohibit the state from excluding for cause venirepersons who indicated with unmistakable clarity that they would never impose a capital sentence.

The Court has since revisited Witherspoon in further defining the proper grounds for excluding venirepersons who oppose capital punishment. In Wainwright v. Witt, the Court addressed the then widely held view that Witherspoon limited exclusions for cause to only those venirepersons who clearly announced that they would never vote for a death sentence. The Wainwright Court

39. Id. at 521.
40. See id. at 519:
   A man who opposes the death penalty, no less than one who favors it, can make
   the discretionary judgement entrusted to him by the State and can thus obey the
   oath he takes as a juror. But a jury from which all such men have been ex-
   cluded cannot perform the task demanded of it.
   (emphasis added); Wainwright v. Witt, 469 U.S. 412, 416 (1985) ("In Witherspoon, this
   Court held that the State infringes a capital defendant's right . . . when it excuses for
   cause all those members of the venire who express conscientious objections to capital
   punishment.") (emphasis added).
41. Witherspoon, 391 U.S. at 522.
42. Id. at 522 n.21. Footnote 21, which has engendered considerable controversy,
states:
   We repeat, however, that nothing we say today bears upon the power of a State
   to execute a defendant sentenced to death by a jury from which the only venire-
   men who were in fact excluded for cause were those who made unmistakably
   clear . . . that they would automatically vote against the imposition of capital
   punishment without regard to any evidence that might be developed at the trial
   of the case before them . . . .

Id.
43. See, e.g., Adams v. Texas, 448 U.S. 38 (1980) (addressing the correct interpreta-
   tion of Witherspoon).
44. 469 U.S. 412 (1985). The Court's latest reassessment of the Witherspoon foot-
   note, prior to Morgan, occurred in Wainwright.
45. Wainwright, 469 U.S. at 417-19. The Court noted that "[d]espite Witherspoon's
   limited holding, later opinions in this Court and the lower courts have referred to the
language in footnote 21, or similar language in Witherspoon's footnote 9, as setting the
standard for judging the proper exclusion of a juror opposed to capital punishment." Id.
   at 418 (citing Maxwell v. Bishop, 398 U.S. 262, 265 (1970); Boulden v. Holman, 394 U.S.
   478, 482 (1969); Hackathorn v. Decker, 438 F.2d 1363, 1366 (5th Cir. 1971); People v.
   Washington, 458 P.2d 479, 496-97 (Cal. 1969)). This interpretation of Witherspoon was
   widespread. See NATIONAL JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES
   § 23.03[2] (2d ed. 1992) [hereinafter JURYWORK] (noting that prior to Wainwright, the
   only venirepersons who could be excluded for cause were those who stated affirmatively
saw this interpretation as part of a "general confusion" over "dicta." The Court dismissed the test of impartiality that resulted as too exacting to be practical. The Court stressed that generally, an impartial juror is one who will "conscientiously apply the law and find the facts." It then held that the state may exclude for cause prospective capital sentencing jurors whose views on capital punishment would "prevent or substantially impair the performance" of their duties.

that they would never vote for a death sentence); Valerie P. Hans, Death by Jury, in CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES 153 (Kenneth C. Haas & James Inciardi eds., 1988) [hereinafter CHALLENGING CAPITAL PUNISHMENT] (indicating that Wainwright necessitated a shift away from the long-term and wide application of the Witherspoon footnote as a limiting standard).

. Wainwright, 469 U.S. at 417-19, 422. The Wainwright Court labeled the footnote dicta because Witherspoon's "holding focused only on circumstances under which prospective jurors could not be excluded; under Witherspoon's facts it was unnecessary to decide when they could be." Id. at 422.

. Id. at 424-25. "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' . . . ." Id.

. Id. at 423.

. Wainwright, 469 U.S. at 424 (Rehnquist, J.) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). The Court introduced the phrase prevent or substantially impair the performance of his duties as a juror as an exclusion standard in Adams, which, even before Wainwright, rejected the Witherspoon footnote as a limit on state challenges for cause. Adams, 448 U.S. at 47-48 (stating that "it is clear beyond peradventure that Witherspoon is not a ground for challenging of any prospective juror").

To further justify its standard, the Wainwright Court added: "[W]e do not believe that [the Witherspoon footnote] language can be squared with the duties of present-day capital sentencing juries." Wainwright, 469 U.S. at 421. The Court noted that when Witherspoon was decided, capital sentencing jurors were largely left to their own discretion in determining a sentence. Id. at 421-22. According to the Court, a juror at that time needed only to be willing to consider the death penalty in order to follow the sparse instructions which were then prevalent. Id. In other words, those instructions had allowed capital sentencing jurors to be guided sheerly by their conscience when choosing between death and imprisonment. The Court reasoned that prospective jurors of that time were thus partial only if their beliefs against capital punishment were so strong that they were in fact incapable of any real choice. Id.

The Court continued by observing that since Furman v. Georgia, 408 U.S. 238 (1972), and Gregg v. Georgia, 428 U.S. 153 (1976), capital sentencing juries have been constrained by more detailed instructions, which guide them through one or more factual determinations as a prerequisite to imposing a death sentence. Wainwright, 469 U.S. at 422. As such, the Court concluded, a currently correct measure of impartiality should focus on a prospective juror's ability to follow instructions, regardless of personal beliefs.

. Id. The Court has since opined:

It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Lockhart v. McCree, 476 U.S. 162, 176 (1986). Observers have commented that under
While Witherspoon and Wainwright addressed the state's power to exclude venirepersons who oppose the death penalty, those cases did not rule on the defendant's right to exclude those who favor it. However, the Court did comment on this issue in Ross v. Oklahoma. In Ross, the trial court had denied a capital defendant's challenge for cause of a venireperson who stated that he would automatically vote for a death sentence upon conviction of the defendant. The defendant removed the venireperson with a peremptory challenge instead. On review, the Court held that the trial court's denial of the challenge for cause did not deprive the defendant of an impartial jury, since the challenged person had never sat on the jury. The Court stated in dicta, however, that had the challenged person been seated, it would have been necessary to overturn the sentence.

D. The Illinois Death Penalty Statute

In Illinois, a defendant convicted of capital murder by a jury may have his sentence determined either by that same jury or by a judge. Capital sentencing by jury consists of two stages, an eligibility stage and a weighing stage. In the eligibility stage, the jury determines whether any aggravating factors are present; if there are none, the defendant is automatically sentenced to a term of imprisonment.

Wainwright, prosecutors can exclude more venirepersons on the basis of their opposition to the death penalty than was possible under the interpretation of the Witherspoon footnote that Wainwright discounted. See JURYWORK, supra note 45, § 23.03(1)(a) (stating that Wainwright "broadened the standards" of exclusion and "will increase the number of people who can be excluded for cause as a result of their beliefs in opposition to the death penalty"); LAFAVE, CRIM. PROC., supra note 15, § 21.3, at 248 (Supp. 1991) (characterizing the Court's decision in Wainwright as adopting a "less demanding standard").

51. Id. at 83-84.
52. Id. at 84.
53. Id. at 85-88.
54. Id. at 85.
56. The Morgan Court employed this useful characterization of the operation of the statute. Morgan, 112 S. Ct. at 2225-26. The statute is found at ILL. REV. STAT. ch. 38, para. 9-1(b)-(g) (1991). A sentencing judge follows essentially the same process. Id. at para. 9-1(h).
57. ILL. REV. STAT. ch. 38, para. 9-1(b)-(h) (1991). "Aggravating factors may include but need not be limited to," murder of a peace officer, firefighter, or corrections officer; multiple murders; murder committed during a hijacking; murder for hire; certain felony murders; exceptionally brutal murder of a victim under 12 years of age; murder of a witness or other person assisting in a criminal prosecution; murder committed in connection with an offense under the Controlled Substances Act; certain murders committed in a correctional institution; "cold, calculated and premeditated" murder. Id. at para. 9-
If the jury unanimously finds beyond a reasonable doubt that one or more aggravating factors exist, the defendant is eligible for a death sentence. The jury then proceeds to the weighing stage, in which it weighs mitigating and aggravating factors against each other. If the jury unanimously finds that the mitigating factors are not sufficient to preclude a death sentence, the court sentences the defendant to death.

III. DISCUSSION

A. The Facts of Morgan v. Illinois

Petitioner Derrick Morgan was charged with the contract murder of a drug dealer. The Illinois prosecutor pursued a capital sentence. As required by Illinois law, the trial court conducted voir dire.

1(b)-(c). The prosecution must prove the existence of aggravating factors beyond a reasonable doubt. Id. at para. 9-1(f).

58. Id.

59. “Mitigating factors may include but need not be limited to,” defendant has no significant prior criminal record; defendant under extreme emotional stress at the time of the murder; victim was a participant in the homicidal conduct or consented to the homicidal act; defendant acted under threat of death or great bodily harm; defendant was not personally present during the commission of the murder. Id. at para. 9-1(c). No burden of proof is specified for mitigating factors.

60. Id. at para. 9-1(b)-(h). The statute directs that “[t]he court . . . shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty.” Id. at para. 9-1(c); see also People v. Simms, 572 N.E. 2d 947, 959 (Ill. 1991) (stating that “[t]he State bears the burden of going forward with factors in aggravation and the defendant has the burden of going forward with evidence of mitigating factors. The sentencing determination is a weighing process in which neither party bears the burden of proof.”) (citations omitted).


62. Morgan, 112 S. Ct. at 2226.

63. Id.

64. Id. (citing People v. Gacy, 468 N.E.2d 1171, 1184-85 (1984), cert. denied, 470 U.S. 1037 (1985)). The controlling Illinois Supreme Court rule states:

The court shall conduct the voir dire examination of prospective jurors by putting to them questions it thinks appropriate touching their qualifications to
Prior to voir dire, the trial court explained capital trial procedure in general terms to each of the three venires called. In addition, pursuant to the prosecutor’s request and over defense counsel’s objection, the court asked each venire en masse whether anyone had beliefs that would prohibit him or her from voting for the death penalty if Morgan were convicted. As a result of their affirmative answers, seventeen venirepersons were excused. Also, each of the jurors eventually empaneled was asked individually a similar question; all said that they would not automatically vote against a death sentence.

After seven members of the first venire, including three who became jurors, were asked individually whether they would automatically vote against a death sentence, defense counsel requested the trial court to ask the venirepersons individually whether they would automatically vote for a death sentence upon a conviction. The court refused, maintaining that it had already substantially covered the question by asking the venirepersons if they could serve impartially and if they could follow jury instructions. In fact, each eventual juror had responded affirmatively to those questions.

The jury convicted Morgan and imposed a death sentence. Morgan appealed his conviction and sentence directly to the Illi-
Illinois Supreme Court, which affirmed the conviction and rejected Morgan's claim that he had been denied an impartial sentencing jury owing to the failure of the court to question the jurors about their pro-death-penalty views. The United States Supreme Court granted certiorari on Morgan's appeal of sentence, noting disagreement among the states on whether a capital defendant has the right to such an inquiry. Finding that the voir dire in Morgan's case had not adequately assured the impartiality of his sentencing jury, the Court reversed the Illinois Supreme Court's affirmation of


74. People v. Morgan, 568 N.E.2d 755, 778 (Ill. 1991). The Illinois Supreme Court claimed that it had previously held that a trial court was not required to ask venirepersons if they would automatically vote for the death penalty. Id. at 778 (citing People v. Brisbon, 478 N.E.2d 402, 409-10 (Ill.), cert. denied, 474 U.S. 908 (1985); People v. Caballero, 464 N.E.2d 223, 234 (Ill.), cert. denied, 469 U.S. 963 (1984)). But see infra note 92.

75. 112 S. Ct. 295 (1991). The Court did not review Morgan's conviction and stated that its decision had no effect on the conviction. Morgan, 112 S. Ct. at 2235 n.11 (citing Witherspoon, 391 U.S. at 523 n. 21).

The effect on guilt-determining juries of excluding anti-death-penalty persons, so-called death qualification, has been explored in cases, commentary, and research. The Witherspoon Court rejected the defendant's claim that his jury:

unlike one chosen at random from a cross-section of the community, must necessarily be biased in favor of conviction, for the kind of juror who would be unperturbed by the prospect of sending a man to his death . . . is the kind of juror who would too readily ignore the presumption of the defendant's innocence, accept the prosecution's version of the facts, and return a verdict of guilt. 391 U.S. at 516-17. The Court found unconvincing the studies that the defendant produced as evidence that death-qualified juries are more likely to convict. Id. at 517-18.

76. Morgan, 112 S. Ct. at 2227. The Court identified three states that agreed with the Illinois position that questions on pro-death-penalty bias are unnecessary if each juror swears to be impartial and to follow instructions: Delaware, South Carolina, and Missouri. The Court identified 11 states that disagreed: California, Georgia, Louisiana, New Jersey, North Carolina, Utah, Virginia, Arkansas, Florida, Kentucky, and Alabama (based on Alabama lower court decisions). Id. at 2227 n.4.
Morgan's sentence.\textsuperscript{77}

\textit{B. The Decision of the Supreme Court}

In the majority opinion, Justice White resolved several issues in determining that the trial court had violated Morgan's due process rights by denying him the requested inquiry.\textsuperscript{78} First, the Court reviewed and affirmed the established principle that if a state chooses to conduct capital sentencing by jury, due process requires that the jury be impartial.\textsuperscript{79} On the basis of that principle, the Court held that a capital defendant may exclude for cause a prospective capital sentencing juror who declares that he or she will automatically vote for the death penalty upon a conviction.\textsuperscript{80} This conclusion might appear to have been easily reached—an automatic death penalty (ADP)\textsuperscript{81} juror would seem to epitomize bias and partiality. In \textit{Wainwright}, however, the Court had ruled that bias makes an individual partial only if it hampers his or her ability to follow sentencing instructions.\textsuperscript{82} Thus, the Court was compelled to demonstrate in detail that ADP bias will have that effect.

The Court first posited that the Illinois capital murder statute,\textsuperscript{83} consistent with general Eighth Amendment requirements,\textsuperscript{84} directs that at the weighing stage, jurors be instructed to determine whether mitigating factors are sufficient to preclude the death penalty.\textsuperscript{85} The Court reasoned that ADP jurors will surely fail to follow these instructions, however, because by announcing an intention to vote automatically for the death penalty, they thereby announce an intention to ignore mitigating evidence—no matter how strong.\textsuperscript{86} Thus, the Court concluded, under \textit{Wainwright} per-

\textsuperscript{77} Id. at 2235.
\textsuperscript{78} Id. at 2228. Justices Blackmun, Stevens, O'Connor, Kennedy, and Souter joined in the majority opinion. Id. at 2225. Chief Justice Rehnquist and Justice Thomas joined in the dissenting opinion written by Justice Scalia. Id. at 2235.
\textsuperscript{79} Id. at 2229.
\textsuperscript{80} Id. at 2230-31, 2233-35.
\textsuperscript{81} In this Note, the acronym \textit{ADP} will be used to refer to persons who would always vote for the death penalty upon a capital conviction, and \textit{NDP} will be used to designate persons who would never vote for the death penalty.
\textsuperscript{82} 469 U.S. at 424; see also supra notes 44-49 and accompanying text.
\textsuperscript{83} The Illinois first degree murder statute itself outlines in detail how capital sentencing juries are to be instructed. ILL. REV. STAT. ch. 38, para. 9-1(b)-(g); see also supra notes 55-61 and accompanying text.
\textsuperscript{84} Morgan, 112 S. Ct. at 2234 (citing Turner v. Murray, 476 U.S. 28, 34-35 (1986) (White, J., plurality opinion)).
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 2234-35.
persons with ADP views are inherently partial and subject to exclusion for cause. A death sentence imposed by a jury containing even one ADP juror, the majority held, cannot stand.

The majority opinion focused only on the weighing stage of the Illinois sentencing process; the Court did not specifically address the question of a juror who would deliberately “find” a nonexistent aggravating factor at the eligibility stage. On the whole, Morgan does not consider the way death penalty bias might affect a sentencing juror in determining the existence of aggravating factors.

The Court next held that upon the defendant’s request, a judge conducting capital voir dire must directly question prospective jurors on their propensity toward imposing capital punishment. The Court began by acknowledging that trial judges have histori-

87. Illinois did not argue to the Morgan Court that ADP jurors could serve impartially on capital sentencing juries. Id. at 2230. The Court addressed the ADP impartiality issue in large part, perhaps, because of the dissent, which contended that ADP jurors serve impartially. See infra notes 103-09 and accompanying text. The Court charged that there was “no support in either the statutory or decisional law of Illinois” for the proposition that an ADP juror could be impartial. Morgan, 112 S. Ct. at 2234. However, in People v. Brisbon, 478 N.E.2d 402, 409-10 (Ill.), cert. denied, 474 U.S. 908 (1985), the Illinois Supreme Court suggested that the fact that a juror would “automatically impose the death penalty for all premeditated murders” does not make that juror subject to exclusion for cause. Thus, Brisbon suggests a position in disagreement with the Morgan Court.

88. Morgan, 112 S. Ct. at 2229-30; see also supra notes 44-49 and accompanying text (discussing the Wainwright rule).

89. Morgan, 112 S. Ct. at 2230.

90. Justice Scalia remarked in his dissent that Morgan had framed the issues in his brief so that “the juror who will ignore the requirement of finding an aggravating factor is not at issue.” Id. at 2236 n.1 (Scalia, J., dissenting). The dissent also indicated that even if raised, that issue would be insubstantial because few jurors would “not impartially make the strictly factual determination, at the first stage of Illinois’ two part sentencing procedure, that the defendant is eligible for the death penalty.” Id.

91. This may have left an issue untouched. It is correct that determination of aggravating factors, at least in Illinois, does involve a factual inquiry into whether the defendant engaged in certain conduct as part of the murder. Did he kill for hire? Was the murder premeditated? See supra notes 56-61 and accompanying text. This fact-finding process might constrain even an ADP juror from conjuring an aggravating factor out of thin air. Still, factual questions are often close. In a close case, an ADP juror’s vote on factual matters affecting the sentence would be assured.

92. Id. at 2228, 2232, 2235. The Court overruled the Illinois Supreme Court, which had relied on its previous rulings to hold that Morgan was not entitled to an ADP inquiry. See People v. Morgan, 568 N.E.2d at 778 (citing Brisbon, 478 N.E.2d at 409-10; Caballero, 464 N.E.2d at 234).

The Illinois court’s reliance on Brisbon and Caballero, however, was arguably misplaced, because the questions involved in those cases were not necessarily the same as the question in Morgan. The Brisbon defendant did not claim that he had been denied an ADP inquiry. 478 N.E.2d at 409-10. Caballero rejected a defendant’s claim that the trial judge erred in not sua sponte questioning the venirepersons on ADP bias. 464 N.E.2d at 234.
ally enjoyed wide discretion in controlling the questions asked in *voir dire.*\(^9\) The Court stressed that this discretion, however, is "subject to the essential demands of fairness,"\(^9\) and that capital cases involve unique concerns, which justify allowing defendants a sentencing-bias inquiry.\(^9\) The Court emphasized that without questions on sentencing bias, capital defendants cannot effectively exercise their right to exclude ADP persons from their sentencing juries.\(^9\) The Court also noted its decisions supporting state-requested inquiries on sentencing bias; the Court reasoned that defendants should have a complementary right to their own inquiries.\(^9\)

Finally, the Court found that in conducting Morgan’s *voir dire,* the Illinois trial court had relied on inadequate questions.\(^9\) Those general questions, the Court maintained, might not have exposed improper pro-death-penalty bias:\(^9\) persons subjected to no more than general questions might believe and even say that they could follow instructions yet still harbor unannounced death penalty biases that would prevent them from doing so.\(^100\) The Court also

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94. Id. (citing Aldridge v. United States, 283 U.S. 308, 310 (1931)).
95. Id. at 2230 (citing Turner v. Murray, 476 U.S. 28, 36-37 (1986); Ham v. South Carolina, 409 U.S. 524, 526-27 (1973)).
96. Id.
97. Id. at 2232 (citing Lockhart v. McCree, 476 U.S. 162, 170 n.7 (1986); *Wainwright,* 469 U.S. at 423). The *Lockhart* Court rejected a defendant’s argument that the State’s exclusion for cause under *Wainwright* of persons opposing the death penalty violated his rights to an impartial guilt-determining jury and to a jury selected from a cross-section of the community. 476 U.S. at 177, 184.
99. Id.
100. Id. The Court quoted the following exchange from *Wainwright* as support for its proposition:

   THE COURT: Wait a minute ma’am. I haven’t made up my mind yet. Just have a seat. Let me ask you these things. Do you have any prefixed ideas about this case at all?
   [A]: Not at all.
   THE COURT: Will you follow the law that I give you?
   [A]: I could do that.
   THE COURT: What I am concerned about is that you indicated that you have a state of mind that might make you unable to follow the law of this State.
   [A]: I could not bring back a death penalty.
   THE COURT: Step down.

*Id.* at 2233 n.9 (citing *Wainwright,* 469 U.S. at 432 n.12).

One author noted a similarly remarkable exchange involving a prospective juror’s preconceived notions of a defendant’s guilt:

[D]uring the questioning of prospective jurors for the 1971 murder trial of Black Panthers Bobby Seale and Ericka Higgins . . . defense attorney Catherine
noted that in *People v. Jackson* the Illinois Supreme Court itself had commented that although it did not require trial judges to provide direct questioning on pro-death-penalty bias, such questioning is not inappropriate and is the best way to expose bias.

C. The Dissenting Opinion

Although the State did not argue that an ADP juror could be impartial, Justice Scalia did. His dissenting opinion squarely contradicted the majority by arguing that ADP jurors can follow instructions as *Wainwright* requires, and thus can serve impartially on capital sentencing juries.

Justice Scalia first noted that the Illinois murder statute requires jurors to determine whether mitigating evidence is "sufficient" to outweigh aggravating factors and thus preclude a death sentence. Justice Scalia reasoned that this requirement does not prohibit a juror from taking the "bright line position" that no mitigating evidence is *ever* sufficient to outweigh an aggravating factor. Such a juror, he concluded, can properly apply Illinois

Roraback asked a juror who had said repeatedly that she could be fair, "Is there anything about your attitude or experiences we haven't covered in all these questions that would make you unable to listen to the evidence in this case and reach an unbiased verdict?" The prospective juror looked directly at the defendant for the first time and burst out, "She's guilty!" . . . The judge promptly excused her for cause.

JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 141 (1977).

102. *Id.* In deciding *Jackson*, the Illinois Supreme Court relied on its *Morgan* ruling to uphold a denial of a capital defendant's request for an ADP inquiry. *Jackson*, 582 N.E.2d at 156. The U.S. Supreme Court has since vacated that judgment in accordance with its ruling in *Morgan*. *Jackson v. Illinois*, 113 S. Ct. 32 (1992). In *Jackson*, despite its holding, the Illinois Supreme Court recommended that capital defendants be allowed a sentencing bias inquiry: "[G]iven the type of scrutiny capital cases receive on review, one would think trial courts would go out of their way to afford a defendant every possible safeguard." 582 N.E.2d at 156.
104. *Id.* at 2236-37 (Scalia, J., dissenting). Chief Justice Rehnquist and Justice Thomas joined in the dissenting opinion. *Id.* at 2235.
105. *Id.* at 2237 (Scalia, J., dissenting). The statute directs:

If there is a unanimous finding by the jury that one or more [aggravating factors] exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

instructions.\textsuperscript{107}

Justice Scalia further maintained that neither due process nor the Eighth Amendment requires capital jurors to actually give weight to mitigating evidence when choosing a sentence.\textsuperscript{108} He concluded, in essence, that although capital defendants have an Eighth Amendment right to present mitigating evidence at sentencing, they do not have a right to sentencing jurors who will listen to it. He maintained that though a juror who ignores mitigating evidence might be "merciless," that juror could nonetheless follow instructions and therefore would not also be "lawless."\textsuperscript{109}

Finally, Justice Scalia argued that even if it were conceded that ADP individuals are partial, due process does not require trial judges to honor requests for specific questions aimed at identifying them.\textsuperscript{110} Justice Scalia charged that as a rule, defendants are entitled to a specific \textit{voir dire} inquiry only if a "special circumstance," like an interracial capital crime, would make refusal to conduct a specific inquiry fundamentally unfair.\textsuperscript{111} Justice Scalia maintained that no circumstance warrants allowing all capital defendants a pro-death-penalty inquiry.\textsuperscript{112} Rather, Justice Scalia opined, general questioning on each venireperson's ability to follow instructions is sufficient, since it is that ability which determines impartiality.\textsuperscript{113}

Justice Scalia acknowledged that Morgan's trial judge conducted an anti-death-penalty (NDP)\textsuperscript{114} inquiry at the prosecutor's request.\textsuperscript{115} He argued, however, that this did not entitle Morgan to complementary questioning as a matter of fairness. This was so, Justice Scalia reasoned, because it takes only one anti-death-pen-
alty juror to block a death sentence, while eleven pro-death-penalty jurors cannot impose one.116

IV. ANALYSIS

Witherspoon, as it was widely interpreted, provided a straightforward and strict standard for excluding prospective capital sentencing jurors who oppose the death penalty. Wainwright set forth a less stringent standard, which, as the Morgan opinions show, proved difficult to interpret and implement. Leaving a gap in the law, the Court's decisions prior to Morgan did not rule on the right of capital defendants to identify and exclude pro-death-penalty jurors.

Through Morgan, the Court has now established sound rules for both states and defendants. Morgan implements fundamental fairness by sensibly characterizing biased capital sentencing jurors. Morgan also reflects the recognition by the Court that judicial autonomy is not an end in itself but rather that it must be balanced against and sometimes subordinated to individual rights. The two major thrusts of Morgan, recognizing capital defendants' rights to specific voir dire inquiries and characterizing biased capital sentencing jurors, are analyzed below.

A. Right to a Specific Inquiry

In deciding whether a defendant has the right to a specific ADP inquiry, the Court encountered the basic tension between preserving judicial autonomy while at the same time providing fairness to criminal defendants. It responded by extending to capital defendants the rare right to a specific voir dire inquiry.117 In doing so, the Court advanced due process rights without unduly sacrificing judicial discretion.

Morgan is a significant departure from past rulings because the Court did not make potential racial or ethnic prejudice in the ve-

116. Id. at 2241 (Scalia, J., dissenting). Proposing that ADP and NDP jurors will have unequal influence on a sentencing jury, Justice Scalia remarked:
I reject petitioner's argument that it is "fundamentally unfair" to allow Illinois to make specific inquiries concerning those jurors who will always vote against the death penalty but to preclude the defendant from discovering (and excluding) those jurors who will always vote in favor of death. . . . [T]here is no unfairness in the asymmetry. By reason of Illinois' death-penalty unanimity requirement . . . the practical consequences of allowing the two types of jurors to serve are vastly different: A single death-penalty opponent can block that punishment, but 11 unwavering advocates cannot impose it.
Id. (citations omitted).
117. See id. at 2233, 2235.
nire a condition of this specific *voir dire* inquiry. Rather, the *Morgan* Court made its allowance for capital defendants solely because they are capital defendants. Thus, the *Morgan* decision may inspire less meritorious *voir dire* claims that similarly do not turn on potential racial or ethnic prejudice. Also, by adding incrementally to the due process rights of capital defendants, the *Morgan* decision arguably further complicates capital punishment jurisprudence.

Nonetheless, fundamentally fair treatment of capital defendants can hardly be achieved unless they are equipped with effective means to detect those jurors who will not be impartial in determining a sentence. Questioning venirepersons about their basic capacity for fairness cannot accomplish this. Only questioning them directly about their sentencing biases can safeguard jury integrity in the way that due process demands.

Clearly, the convicted capital defendant has a paramount due process concern: that the jury which chooses a punishment of either incarceration or execution will do so in an impartial manner. In selecting that jury, judicial autonomy should be

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118. See supra note 27 and accompanying text.

119. Justice Scalia charged:

Today, obscured within the fog of confusion that is our annually improvised Eighth-Amendment "death-is-different" jurisprudence, the Court strikes a further blow against the People in its campaign against the death penalty. Not only must mercy be allowed, but now only the merciful may be permitted to sit in judgment.

*Morgan*, 112 S. Ct. at 2242 (Scalia, J., dissenting).

Justice Scalia's *Morgan* dissent has been cited as an example of the "[t]ensions on the Supreme Court, arising from strongly held and widely divergent philosophies, [which] increasingly find reflection in intemperate language in the Justices' opinions." Arnold C. Johnson, *Supreme Court Sound and Fury*, LEGAL TIMES, December 14, 1992, at 30.

120. The majority of the states that have considered the issue support this view. See supra note 76; e.g., People v. Bittaker, 774 P.2d 659, 679 (Cal. 1989), cert. denied, 496 U.S. 931 (1990) ("In order to intelligently exercise the right to challenge for cause defendant's counsel must be accorded reasonable opportunity to lay a foundation for the challenge by questioning prospective jurors on *voir dire* to learn whether any entertain"

ADP views.) (quoting People v. Hughes, 367 P.2d 33, 36 (Cal. 1961)); State v. Williams, 550 A.2d 1172, 1184 (N.J. 1988) ("[T]he failure to inquire into [ADP views] denied counsel and the trial court the tools with which to insure that the jury panel could fairly undertake its role . . . ").

subordinated to the capital defendant’s unique due process concerns in order to properly safeguard the defendant’s interest in life. Capital defendants deserve access to the inquiry that Derrick Morgan was denied. Furthermore, providing that access will help maintain an image of basic fairness in our criminal justice system.

B. Juror Impartiality

Morgan establishes three points regarding impartiality. First, it holds that ADP jurors are partial and may be excluded for cause. Second, it supports the already established practice of excluding NDP persons. In making these first two points, the Court has acknowledged that capital jurors who decide a sentence is at stake, the risk that a particular defendant has been selected [for a death sentence] for the wrong reason is unacceptable and incompatible with the Eighth and Fourteenth Amendments’); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (Burger, C.J., plurality opinion) (noting that the “qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed”).

122. The subordination of judicial autonomy is minor: “The risk that [ADP] jurors may have been empaneled in this case and ‘infected petitioner’s capital sentencing is unacceptable in light of the ease with which that risk could have been minimized.’” Morgan, 112 S. Ct. at 2233 (quoting Turner, 476 U.S. at 36). The Court noted in Rosales-Lopez v. United States, 451 U.S. 182, 190 (1981), that the burden placed on a trial court by requiring it to ask racial bias questions would “likely . . . be slight.” The Mu'Min dissent rejected “the majority’s claim that content questioning . . . would unduly burden trial courts,” noting that “[n]umerous Federal Circuits and States” had concluded that content questions would not “compromis[e] judicial efficiency.” Mu'Min v. Virginia, 111 S. Ct. 1899, 1916-17 (1991) (Marshall, J., dissenting). For a discussion of Mu'Min, see supra note 27.

123. The Court has spoken to this concern in countering a proposal that defendants not be allowed an inquiry on racial bias:

We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute. Rosales-Lopez, 451 U.S. at 191 (quoting Aldridge, 283 U.S. at 314-315).

124. Morgan, 112 S. Ct. at 2229-30. This point may not be a “holding” in the purest sense. To illustrate, the Court phrased the core issue before it as “whether, during voir dire for a capital offense, a state trial court may, consistent with the Due Process Clause of the Fourteenth Amendment, refuse inquiry into whether a potential juror would automatically impose the death penalty upon conviction of the defendant.” Id. at 2225. Before reaching its holding on that overarching question, the Court found it necessary to resolve whether an ADP sentencing juror is partial. Id. at 2230; see also supra note 87. It was perhaps necessary to answer that question only because Justice Scalia raised it. See supra note 87. This makes the Court’s point on the partiality of ADP jurors an unusual component of its holding.

125. Morgan, 112 S. Ct. at 2229, 2233. Since Morgan ruled specifically on the impartiality of ADP jurors, any statement it made on the impartiality of NDP jurors can be characterized as dicta. However, six Justices agreed that NDP jurors are undeniably partial. See id. at 2229. The Court also stated that along with ADP jurors, NDP jurors
before trial cannot reasonably follow sentencing instructions and are therefore partial under Wainwright. Finally, Morgan makes Wainwright's general "follow the instructions" standard applicable to both states and defendants.\textsuperscript{126} Under that standard, venirepersons with less than absolute death penalty beliefs can be assessed for their ability to follow capital sentencing instructions properly.\textsuperscript{127}

All told, neither side enjoys an advantage over the other. Nonetheless, states might argue, as Illinois did in Morgan, that because it may take several unanimous jury findings in order to impose a death sentence,\textsuperscript{128} states cannot adequately advance their interest in capital punishment unless they are allowed an advantage in seating death penalty proponents.\textsuperscript{129} Capital defendants might counter that the severity and irrevocability of capital punishment entitles them to their own advantage in excluding such persons. Nevertheless, it is most judicious to provide both parties with equal means to pursue their interest in seating a favorable sentencing jury. If the legislature and the people choose to punish certain offenders

\textsuperscript{126}See supra notes 42-49 and accompanying text. However, as of Morgan the Court still maintains: "At its inception, Witherspoon conferred no 'right' on a State, but was in reality a limitation of a State's making unlimited challenges for cause to exclude those jurors who 'might hesitate' to return a verdict imposing death." Morgan, 112 S. Ct. at 2231 (citing Witherspoon, 391 U.S. at 512-13).

The Court's approach suggests that though it agrees with the assertion in the footnote that those who would never impose a death sentence are partial, it is concerned about lending too much authority to the footnote and thus raising again the widespread interpretation of it as a limit on exclusion grounds.

Regardless of any vagaries in the Court's opinions, probing for and excluding death penalty opponents remains an almost universal practice in capital voir dire. JURYWORK, supra note 45, § 23.03.

\textsuperscript{127}See supra note 45, § 23.03[1][a] (noting that the broad Wainwright standard can be applied to exclude venirepersons with less than absolute death penalty beliefs).

\textsuperscript{128}In Illinois, for example, the jury must unanimously convict the defendant, find an aggravating factor, and agree that mitigating circumstances do not rule out a death sentence. See supra notes 55-61.

\textsuperscript{129}Morgan, 112 S. Ct. at 2232 n.8.
with death, that punishment should be imposed in a forum in which neither party has a procedural advantage over the other.

Indeed, Justice Scalia's position that ADP jurors can be impartial is not entirely untenable. He argued persuasively that the Illinois murder statute and prior Court decisions require only that capital sentencing jurors hear mitigating evidence, not that they also be amenable to it.130

Regarding the Illinois statute, Justice Scalia's difference with the Court turned on his determination that the word sufficient would accommodate the absolutist juror who believes that no mitigating factor should ever preclude a death sentence for a murder with an aggravating factor.131 There is nothing that directly supports or refutes this position in the text of the statute. In fact, the Illinois Supreme Court suggested in People v. Brisbon that it would follow Justice Scalia's view.132 Additionally, the Free v. Peters court, which recently vacated an Illinois death sentence on constitutional grounds,133 wrestled with the ambiguity of the word sufficient in the context of the statute.134 In view of all of this, Justice Scalia's argument looks at least creative if not correct.

To support his assessment of Eighth Amendment requirements, Justice Scalia offered a restrictive interpretation of key phrases from numerous Court rulings. By his narrow reading, in each case the Court went no further than to affirm the capital defendant’s bare right to present mitigating evidence at sentencing. That interpretation, while conveniently literal, is not outright unreasonable.135

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130. Id. at 2236-38.
131. Id.
132. 478 N.E.2d 402 (Ill.), cert. denied, 474 U.S. 908 (1985); see also supra note 87.
135. To demonstrate that the Court's death penalty cases allow for the “merciless” juror, Justice Scalia supplied an extensive string cite of those cases. He quoted phrases stating variously that: “[the Eighth Amendment is satisfied] by allowing the jury to consider all relevant mitigating evidence”; “the State cannot bar relevant mitigating evidence”; “[jurors must] be permitted to consider and give effect to mitigating evidence”; “[states may not] prevent the sentencer from considering and giving effect to mitigating evidence”; “[the sentencer] must be free to weigh relevant mitigating evidence.” Morgan, 112 S. Ct. at 2238 (citations omitted). Reading these phrases as Justice Scalia did does not necessarily contradict their plain meaning. Nor does a plain reading necessarily support the meaning the Court would give them.

The power of Justice Scalia's argument may also come from the nature of his writing: “From a dramatic standpoint, too, Scalia stands out. Of the three justices who regularly write their own opinions (David Souter and John Paul Stevens are the other two), only
In summary, though Justice Scalia's semantics may raise eyebrows in the context of this case, his conclusions are not patently erroneous. The Court could have taken his view without abandoning, at least technically, supportable reasoning or express precedent. The Court instead ruled reasonably and fairly.

V. IMPACT

The *Morgan* decision affects capital offense *voir dire* in Illinois and in all other states that have denied or would deny defendants the right to a *voir dire* inquiry on death penalty views. Defendants will no longer have to rely on general questioning by trial judges to expose persons whose biases render them unqualified to sit on capital sentencing juries. Also, prisoners currently on death row may have a new avenue for appeal.136

*Morgan*, however, may leave room for interpretation regarding exactly what inquiry it prescribes. The most obvious reading of *Morgan* limits defendants to a very specific inquiry, perhaps just one question: “Will you automatically vote for a death sentence?”137 That reading, however, departs from the Court’s past rulings, which required judges to cover only a certain subject rather than to ask precisely scripted questions.138 Consistent with those past rulings, *Morgan* could be interpreted as requiring *some* inquiry on sentencing bias, with the particulars still shaped by the trial judge.139 In the future, counsel and the courts may have to

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137. Supporting the possibility that the Court meant to mandate only the specific ADP question, the Court defined the issue before it narrowly. See *Morgan*, 112 S. Ct. at 2225; see also *supra* note 124. The Court ruled that “the defendant in this case was entitled to have the inquiry made that he proposed to the trial judge.” *Id.* at 2235. That precise inquiry was: “If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?” *Id.* at 2226. The Court also stated that its ruling dealt with the need for a *voir dire* to “lay bare the foundation of petitioner’s challenge for cause against those prospective jurors who would always impose death following conviction.” *Id.* at 2232. Taking the Court at its word suggests that it intends defendants to have an ADP-specific inquiry only.

Moreover, the Court’s holding focuses on ADP bias; it does not address the question of how less pronounced forms of sentencing bias might result in partiality. See *Morgan*, 112 S. Ct. at 2229-30, 2233-35. Perhaps, then, the Court meant to limit the questions it mandated to ones (or one) on the very specific topic it addressed.

138. See *supra* note 29 and accompanying text.

139. From the defendant’s tactical viewpoint, either direct ADP questions or more
resolve this uncertainty.

The impact of *Morgan* will depend in large part on the number of ADPs in the jury pool. Estimates are disparate.\textsuperscript{140} Adding to the uncertainty is the possibility that what persons report to researchers may not accurately conform with their behavior when they actually sentence a capital offender.\textsuperscript{141}

*Morgan* should also promote the effective use of peremptory challenges by capital defendants. A response to *Morgan*-authorized questioning that does not justify exclusion for cause may still provide reason to exercise a peremptory challenge.\textsuperscript{142} Without a

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\textsuperscript{140} See, e.g., Michael T. Nietzel et al., *Effects of Voir Dire Variations in Capital Trials: A Replication and Extension*, 5 BEHAV. SCI. & L. 467, 473 (1987) (stating that of 242 prospective capital jurors removed for cause in 18 trials, 25.8% were removed because they were ADPs); Michael L. Neises & Ronald C. Dillehay, *Death Qualification and Conviction Proneness: Witt and Witherspoon Compared*, 5 BEHAV. SCI. & L. 479, 485 (1987) (noting that a survey of 135 registered voters in Kentucky showed 24.1% to be ADPs); Joseph Kadane, *After Hovey: A Note on Taking Account of the Automatic Death Penalty Juror*, 8 L. & HUM. BEHAV. 115, 116 (1984) (finding that 1% of the national adult population claimed they would be fair and impartial in deciding guilt or innocence in a capital case but would always vote for the death penalty); Grigsby v. Mabry, 569 F. Supp. 1273, 1296-97 (E.D. Ark. 1983) (stating that 2% of respondents in a nonrandom survey were ADPs) (citing George L. Jurow, *New Data on the Effect of a “Death-Qualified” Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971)).

\textsuperscript{141} See *Welsh S. White, Life in the Balance: Procedural Safeguards in Capital Cases* 101 (1984) (stating that “[e]ven the most well-designed social science experiment will only provide, at best, circumstantial evidence of the truth of the proposition it seeks to prove”); Kenneth C. Haas & James Inciardi, *Lingering Doubts About a Popular Punishment*, in *Challenging Capital Punishment*, supra note 45, at 11 (noting that “people’s willingness to endorse capital punishment in the abstract is not necessarily an accurate measure of their willingness to put it into practice”).

\textsuperscript{142} See People v. Howard, 588 N.E.2d 1044, 1057-58 (Ill. 1991), cert. denied, 113 S.
Morgan inquiry, a sentencing bias might not be exposed at all.

The Morgan decision should be interpreted as clearly and comprehensively delineating the proper grounds for challenges for cause based on capital sentencing biases. The difficulty the Court has had in setting and promulgating an impartiality standard, however, indicates that Morgan may not be the final word on this subject.

Morgan may stir more determined state legislatures to revise their capital sentencing laws to the advantage of prosecutors seeking the death penalty. States may also choose to delegate capital sentencing to trial judges, many of whom must please a public that largely supports the death penalty in order to secure elected posts.

VI. CONCLUSION

The Morgan Court recognized that capital defendants need special safeguards to ensure the integrity of sentencing juries. The Court also made clear that the Constitution will not allow capital sentencing to be entrusted to jurors who would determine a sentence before the trial begins. The Court has thus extended to capital defendants what fundamental fairness requires. Death penalty

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143. See supra notes 33-49 and accompanying text.

144. A LEXIS search performed on March 18, 1993 revealed the following legislative proposals to add aggravating factors to death penalty laws: Illinois (murder committed with a machine gun, sawed-off shotgun or rifle, semi-automatic shotgun or rifle, molotov cocktail, bomb, or grenade); Florida (victim was a minor in defendant's care); Maryland (witness murder, murder related to a drug offense, murder committed during a carjacking); New Jersey (murder connected with drug trafficking); South Carolina (murder committed during a carjacking). These are presented not to suggest a direct correlation with Morgan but rather to show the steps that can be taken by states to widen the application of the death penalty.

145. See supra note 32.

146. Since the Constitution does not require states to conduct capital sentencing by jury, revising statutes or delegating capital sentencing to judges would not necessarily be prohibited. See supra note 11. Indeed, in a footnote to his Witherspoon dissent, Justice White announced: "The States should be aware of the ease with which they can adjust to today's decision ... replacing the requirement of unanimous jury verdicts with majority decisions about sentence should achieve roughly the same result reached by the Illinois legislature through the procedure struck down today." 391 U.S. at 542 n.2.

In Morgan, Justice Scalia charged that "the wholesale elimination of jurors favoring the death penalty ... will be the consequence of today's decision." 112 S. Ct. at 2241. While it may prove to be an overstatement, Justice Scalia's charge demonstrates the fervor with which death penalty proponents can react to cases like Morgan.
opponents and advocates alike should view the *Morgan* decision as balancing the scales of justice.

THOMAS J. EME