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John Holdridge

SELECTING CAPITAL JURORS UNCOMMONLY WILLING TO CONDEMN A MAN TO DIE: LOWER COURTS' CONTRADICTORY READINGS OF *Wainwright v. Witt* AND *Morgan v. Illinois*

*John Holdridge**

This article will explore the conflicting legal standards governing the "death/life qualification" component of voir dire in capital cases. By death/life qualification, I mean the questioning of prospective jurors regarding both their willingness to consider the imposition of a death sentence and their willingness to consider the imposition of a life sentence. As will be demonstrated, this law is a farrago of contradictory decisions (many by the same courts) that virtually guarantees the selection of jurors uncommonly willing to sentence a capital defendant to death. The issues addressed in this Article are in urgent need of resolution by the United States Supreme Court.

This Article begins with an introduction that discusses the relevant United States Supreme Court jurisprudence. It proceeds to set forth the conflicting approaches taken by lower courts to the legal standards governing the death/life qualification component of voir dire in capital cases, particularly with respect to whether rulings on challenges for cause of prospective jurors should be based solely on their views of capital punishment in the abstract or also on their views of the appropriateness of a particular sentence under the facts of the case to be tried. The Article argues that recent lower-court decisions have used two contradictory standards: while lower courts have approved prosecution challenges to prospective jurors based on their willingness to impose a death sentence under the facts of the case to be tried, lower courts have refused to approve defense challenges to prospective jurors based on their willingness to impose a life sentence under the facts of the case to be tried. The Article argues that this double standard is inconsistent with United States Supreme Court decisions and produces juries unfairly in favor of death sentences. The Article concludes by calling upon the United States Supreme Court to address the issues that it explores.

I. INTRODUCTION

This introduction will address two areas of United States Supreme Court jurisprudence pertinent to the subject of this Article. First, it will discuss the Court's decisions setting forth the constitutional requirements of a capital punishment scheme. Second, the introduction will explore the Court's decisions governing the death/life qualification component of the voir dire of capital jurors. In essence, these decisions instruct that the parties may challenge for

* B.A., Lawrence University, 1977; J.D., New York University, 1988. John Holdridge is the director of the Mississippi and Louisiana Capital Trial Assistance Project, New Orleans.

cause capital jurors who do not manifest a willingness to follow their state's capital punishment scheme (i.e., to "follow the law"), including a fair consideration of the penalties authorized by the scheme.

A. The Constitutional Requirements of a Capital Punishment Statutory Scheme.

In its landmark case of *Furman v. Georgia*, the United States Supreme Court held that the Eighth and Fourteenth Amendments prohibit imposition of capital punishment when "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[1] Four years later, the Court held that the death penalty may be constitutionally imposed, but only if "the sentencing body's discretion [is] suitably directed and limited."[2] Specifically, the Court in *Gregg v. Georgia* held that capital punishment schemes must limit the sentencing body's discretion by narrowing the class of defendants statutorily eligible for the death penalty through aggravating circumstances.[3] Furthermore, the Court in *Woodson v. North Carolina* held that capital punishment schemes must require the sentencing body to "consider[ ] the character and record of the individual offender and the circumstances of the particular offense" in determining the appropriate sentence.[4]

Two years later, the Court stated that the reason the Eighth Amendment requires the sentencer to consider the particular circumstances of the offense, and character and record of the individual defendant, is that "an individualized [sentencing] decision is essential in capital cases."[5] In *Lockett v. Ohio*, the Court struck down as unconstitutional Ohio's capital punishment scheme because it did "not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases."[6]

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1. Furman v. Georgia, 408 U.S. 238, 310-13 (1972) (White, J., concurring); *id.* at 306, 310 (Stewart, J., concurring) (death penalty violates Eighth and Fourteenth Amendments when "wantonly and . . . freakishly imposed"). Prior to *Furman*, the Eighth Amendment was understood to prohibit only: (1) certain *types* of punishments (i.e. torture) (Wilkerson v. Utah, 99 U.S. 130 (1879)); and (2) punishments that are *disproportionate* to the crimes being punished. Weems v. United States, 217 U.S. 349, 370 (1910).

2. Gregg v. Georgia, 428 U.S. 153, 189 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

3. *Gregg*, 428 U.S. at 196 (approving Georgia's use of statutory aggravating circumstances to narrow the class of death-eligible defendants).

4. *Woodson*, 428 U.S. at 304. *See also* Buchanan v. Angelone, 522 U.S. 269 (1998); Tuilaepa v. California, 512 U.S. 967 (1994); Proffitt v. Florida, 428 U.S. 242, 258 (1976) ("the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed").

5. Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion) (emphasis added). *See also* Stringer v. Black, 503 U.S. 222, 232 (1992) (capital punishment schemes must ensure defendant "receive[s] an individualized sentence"); Clemons v. Mississippi, 494 U.S. 738, 752 (1990) (defendant entitled to "individualized treatment").

6. *Lockett*, 438 U.S. at 605. The Court stated:

> We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.

In *Lockett* and the numerous cases that have followed it,[7] the Court has held that capital punishment schemes must permit defendants to offer all mitigating factors relevant to "the character and record of the individual offender and the circumstances of the particular offense."[8]

The Court has held not only that a capital defendant must be permitted to offer all relevant mitigating circumstances, but that "the sentencer [must] listen"—that is, the sentencer must consider the mitigating circumstances when deciding the appropriate sentence.[9] However, the Court has drawn a clear and important distinction between jurors' consideration of mitigation and the weight that they assign it.[10] Thus, although the Court has held that under the Eighth Amendment jurors must consider mitigation, the Court has also held that it must be the "sentencer [who] determine[s] the weight to be given relevant mitigating circumstances."[11]

In addition, while the Court has declared unconstitutional capital punishment schemes that mandate the death penalty for certain types of crimes,[12] the Court has upheld schemes under which death is a mandatory punishment if the jury makes certain findings that necessitate a consideration of mitigating evidence.[13]

B. The United States Supreme Court's Decisions on the Death/Life Qualification of Prospective Jurors During Voir Dire.

Any discussion of the United States Supreme Court jurisprudence addressing the death/life qualification of capital jurors must begin, but not end, with the

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7. *See, e.g.*, Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986); *see also* Zant v. Stephans, 462 U.S. 862, 885 (1983) ("defendant's mental illness . . . militate[s] in favor of a lesser penalty" than death); Roberts v. Louisiana, 431 U.S. 633, 637 (1977) (defining mitigating circumstances as "[c]ircumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance").

8. *Lockett*, 438 U.S. at 601 (quoting *Woodson*, 428 U.S. at 304).

9. Eddings v. Oklahoma, 455 U.S. 104, 115 n.10 (1982). *See also* Penry v. Lynaugh, 492 U.S. 302, 319, 321, 327 (1988) (defendant has "'the right to have the sentencer consider and weigh relevant mitigating evidence'" (citation omitted); "'the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence'" (citation omitted); decision to impose death penalty is "a reasoned moral response to the defendant's background, character and crime"); McCleskey v. Kemp, 481 U.S. 279, 306 (1987) ("State cannot channel the sentencer's discretion but must allow it to consider any relevant information offered by the defendant").

10. Whether or not this distinction is a persuasive one is arguable. It might be that a prospective juror who states that she will consider a mitigating circumstance is necessarily a juror who will accord it at least some weight. On the other hand, it is by no means clear that a prospective juror who will accord a specific mitigating circumstance some weight will be highly likely to vote for a life sentence after hearing about the facts and circumstances of the crime, the aggravating circumstances, and the character and background of the defendant.

11. *Eddings*, 455 U.S. at 114-15. *See also* Mills v. Maryland, 486 U.S. 367, 376 n.8 (1988) (it is in the "jury's discretion [to] attach[] significance to the presence of mitigating circumstance[]"). *And see Penry*, 492 U.S. at 319 (jurors make "individualized assessment of the appropriateness of the death penalty").

12. Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 431 U.S. 633 (1977).

13. Boyde v. California, 494 U.S. 370 (1990) (upholding constitutionality of death penalty statute under which death is mandatory punishment if jury determines that aggravating circumstances outweigh mitigating circumstances); Blystone v. Pennsylvania, 494 U.S. 299, 305 (1990) (same); Jurek v. Texas, 428 U.S. 262 (1976).

Court's seminal decision in *Witherspoon v. Illinois*.[14] In *Witherspoon*, the Court addressed whether and when the prosecution may challenge for cause prospective jurors because of their views against capital punishment.[15] The Court held that the prosecution may challenge for cause only prospective jurors who make unmistakably clear that "they would automatically vote against the imposition of the capital punishment without regard to any evidence that might be developed at the trial of the case before them."[16] The Court further stated:

> [V]eniremen . . . cannot be excluded for cause . . . simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a veniremen in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.[17]

The Court explained its decision by stating that "a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death"—that is, a tribunal comprised only of jurors "uncommonly willing to condemn a man to die."[18]

Soon after *Witherspoon* was handed down, the Court issued a summary decision in *Jaggers v. Kentucky*,[19] in which the Court reversed the holding of the

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14. Witherspoon v. Illinois, 391 U.S. 510 (1968). *Witherspoon* was decided prior to the Court's landmark decisions in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153, 190 (1976), in which the Court held that the Eighth Amendment to the United States Constitution requires special procedural requirements in capital cases, including (almost certainly) a bifurcated capital sentencing hearing. Accordingly, when *Witherspoon* was handed down, jurors decided both guilt and sentence at the same time. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY, 435, 444, 448-49 (1966). The United States Supreme Court has issued inconsistent pronouncements with respect to whether its holdings in *Furman* and *Gregg* affected its holding in *Witherspoon*. In *Adams v. Texas*, 448 U.S. 38 (1980), the Court applied the holding of *Witherspoon* to bifurcated capital proceedings. However, in *Wainwright v. Witt*, 469 U.S. 412, 421-22 (1985), the Court justified its modification of the *Witherspoon* test based on its holdings in *Furman* and *Gregg*. The Court reasoned that given the unfettered discretion of jurors prior to *Furman*, a juror at that time who was not unalterably opposed to capital punishment was able to follow the law. The Court stated that in light of the limited and directed discretion of jurors after *Furman*, that was no longer true. But in *Morgan v. Illinois*, 504 U.S. 719, 731 n.6 (1992), the Court once again rejected the argument that *Witherspoon's* principles do not apply to capital bifurcated proceedings. Although a full examination of this question is beyond the scope of this Article, it is significant that, since *Witt*, the Court has held that jurors may be accorded unfettered discretion at a capital sentencing hearing. Tuilaepa v. California, 512 U.S. 967, 975-80 (1994) (jurors at capital sentencing hearings may be accorded unfettered discretion to consider aggravating and mitigating circumstances in determining the appropriate penalty).

15. *Witherspoon*, 391 U.S. at 510. The decision in *Witherspoon*, like all of the Court's decisions addressing death-qualification voir dire, was rooted in the Fourteenth Amendment to the United States Constitution. The reason is that the Court has held that capital defendants do not have a right under the Sixth and Eighth Amendments to be sentenced by a jury but, if given a jury, it must be fair and impartial under the Fourteenth Amendment. *See, e.g.*, Morgan v. Illinois, 504 U.S. 719 (1992).

16. *Witherspoon*, 391 U.S. at 523 n.21.

17. *Id.*

18. *Id.* at 521. *See also* Lockhart v. McCree, 476 U.S. 162, 182 (1986) (*Witherspoon* and *Adams v. Texas*, 448 U.S. 38 (1980), "dealt with the special context of capital sentencing, where the range of jury discretion necessarily gave rise to far greater concern over the possible effects of an 'imbalanced' jury").

19. Jaggers v. Kentucky, 403 U.S. 946 (1971).

Kentucky Supreme Court in *Jaggers v. Commonwealth*, which had upheld the exclusion of prospective jurors because they "stated that their scruples would prevent imposition of a death sentence by them 'in this case.'"[20]

In *Adams v. Texas*, the Court purported to follow the holding in *Witherspoon* when it reversed the appellant's death sentence because of the improper exclusion for cause of prospective jurors based on their views against capital punishment.[21] However, instead of requiring that excludable prospective jurors make unmistakably clear that they would automatically vote against the imposition of capital punishment, the Court in *Adams* stated that the test was whether the views of the jurors "would prevent or substantially impair the performance of [their] duties as a juror in accordance with [their] instructions and [their] oath."[22] In *Adams*, the Court also stated that an "inability to deny or confirm any effect whatsoever [of a prospective juror's views against capital punishment] is [not] equivalent to an unwillingness or an inability on the part of the jurors to follow the Court's instructions and obey their oaths," and that Texas had improperly allowed for the exclusion of jurors "whose only fault was . . . to acknowledge honestly that they might or might not be affected" by the prospect of imposing a death sentence.[23]

In *Wainwright v. Witt*, the Court explicitly adopted *Adams'* modification of *Witherspoon*, holding that the standard for juror exclusion is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath,'" and not whether the juror made unmistakably clear that he would automatically vote against the death penalty.[24] Citing *Adams v. Texas*, in which the Court had commented that states retain "a legitimate interest in obtaining jurors who could follow their instructions and obey their oaths,"[25] the Court in *Witt* held that, to be challengeable for cause, prospective jurors need not be unalterably opposed to capital punishment, regardless of the facts and circumstances that might develop at trial; rather, it is sufficient if their opposition to capital punishment, regardless of the facts and circumstances, would substantially impair their ability to apply the law.[26] Accordingly, in *Witt*, the Court did not alter *Witherspoon's* holding to the extent that it framed the question of whether prospective jurors are challengeable for cause in terms of their views of capital punishment in the abstract and not under

20. Jaggers v. Commonwealth, 439 S.W.2d 580, 585 (Ky. 1968).
21. Adams v. Texas, 448 U.S. 38 (1980).
22. *Id.* at 45.
23. *Id.* at 50-51.
24. Wainwright v. Witt, 469 U.S. 412, 423 (1985).
25. *Id.* at 420 (citing *Adams*, 448 U.S. at 44).
26. *Witt*, 469 U.S. at 424 n.5:

> We adhere to the essential balance struck by the *Witherspoon* decision rendered in 1968 . . . ; we simply modify the test stated in *Witherspoon's* footnote 21 to hold that the State may exclude from capital sentencing juries that 'class' of veniremen whose views would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths.

The Court also held in *Witt* that the potential jurors' inability to serve need not be shown with unmistakable clarity, as the Court had held in *Witherspoon*. *Id.* at 412.

the facts of the case to be tried. That is, *Witt* did not modify the statement in *Witherspoon* that

> veniremen . . . cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him.[27]

In addition to holding that the prosecution may challenge for cause prospective jurors who are unable to fairly consider the imposition of the death penalty, the United States Supreme Court has held that, under the Due Process Clause of the Fourteenth Amendment, the defense may challenge for cause prospective jurors who will automatically vote for a death sentence regardless of the facts or circumstances that might develop at trial. In *Ross v. Oklahoma*, the United States Supreme Court stated in dicta that the trial court erred in refusing to excuse for cause a potential juror who stated that he would automatically vote for the death penalty.[28] In *Morgan v. Illinois*, the Court "reiterated [the] view" that it had expressed in *Ross*, which the Court explained was rooted in its decision in *Witt*.[29] In *Morgan*, the Court reversed the appellant's death sentence because the trial court refused inquiry during voir dire of whether prospective jurors would automatically vote for a death sentence.[30] The Court held that "[a] juror who will automatically vote for the death penalty *in every case* will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to."[31] The Court ruled that a trial court must excuse for cause any "juror who . . . will automatically vote for the death penalty" as well as "[a]ny juror to whom mitigating factors are . . . irrelevant."[32] The Court further held that a defendant must be allowed to identify prospective jurors who have "predetermined the terminating issue of his trial, that being whether to impose the death penalty."[33]

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27. Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968). The Court reiterated this holding in *Darden v. Wainwright*, 477 U.S. 168, 178 (1986) (prospective juror may be excluded for cause only if "he could not under any circumstances recommend the death penalty").

28. Ross v. Oklahoma, 487 U.S. 81, 85 (1988). In *Ross*, although the Court discussed a prospective juror who had stated that he would automatically vote for a death sentence, the Court used the *Witt* test, stating that the prospective juror's views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.'"

29. Morgan v. Illinois, 504 U.S. 719, 728-29 (1992). The Court stated that the holdings of "*Witt* and *Adams*, the progeny of *Witherspoon*, [are] that a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause."

30. *Id.*

31. *Id.* at 729. *See also Id.* at 735 ("Any juror who would impose death *regardless of the facts and circumstances of conviction cannot follow the dictates of law.*") (emphasis added); *Id.* ("[J]urors—whether they be unalterably in favor of, or opposed to, the death penalty *in every case*—by definition are ones who cannot perform their duties in accordance with law . . .") (emphasis added). In *Morgan*, the Court did not address whether prospective jurors must be excused for cause if they deem the specific mitigating circumstances in the case to be tried irrelevant to their sentencing decision, or whether trial courts must allow inquiry into that question.

32. *Id.* at 738-39. The Court further held that a trial court may *not* refuse a defendant's request for "direct inquiry into this matter," even if "other questioning purports to assure the defendant a fair and impartial jury about to follow the law."

33. *Id.* at 736.

While the opinion in *Morgan* used the phrase "automatically vote for the death penalty,"[34] it is by no means clear that the Court intended to limit the breadth of its holding only to prospective jurors who express unalterable opposition to a life sentence.[35] Certainly, the *Morgan* decision should be interpreted to extend to prospective jurors who met the *Witt* standard and whose ability to fairly consider a life sentence is substantially impaired, even if they do not manifest an unalterable opposition to a life sentence. This is so for a number of reasons. First, the decision cites *Ross* with approval, and explains the *Ross* dicta as follows: "[T]he trial court's failure to remove the juror for cause was constitutional error under the standard enunciated in *Witt*."[36] Second, the decision in *Morgan* itself relies heavily upon the *Witt* holding.[37] Third, the decision in *Morgan* states, "Illinois has chosen to provide a capital defendant 12 jurors to decide his fate, and each of these jurors must stand equally impartial in his or her ability to follow the law."[38] Jurors who are substantially impaired in their ability to consider a life sentence clearly do not stand impartial in their ability to follow the law. Fourth, it would be logically insupportable to hold that prospective jurors whose ability to consider a death sentence is substantially impaired can be challenged for cause, but prospective jurors whose ability to consider a life sentence is substantially impaired cannot be challenged for cause.[39]

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34. Numerous commentators have noted *Morgan's* failure to "strike a perfect balance between 'life qualification' and 'death qualification.'" *See, e.g.*, John C. Belt, Morgan v. Illinois: *The Right to Balance Capital Sentencing Juries as to their Views on the Death Penalty is Finally Granted to Defendants*, 24 N.M. L. REV. 145, 166 (1994).

35. *Morgan*, 504 U.S. at 750, n.5 (Scalia, J., dissenting). Justice Scalia stated:

> If, as the Court claims, this case truly involved "the reverse" of the principles established in *Witherspoon v. Illlinois*, 391 U.S. 510 (1968), and the cases that followed it, *ante*, at 731, then it is difficult to understand why petitioner would not be entitled to challenge, not just those jurors who will "automatically" impose the death penalty, but also those whose sentiments on the subject are sufficiently strong that their faithful service as jurors will be *"substantially impaired"* . . . . The Court's failure to carry its premise to its logical conclusions suggests its awareness that the premise is wrong.

Justice Scalia was right to suggest that the logical conclusion of the decision in *Morgan* is that the defense must be allowed to challenge for cause prospective jurors whose ability to fairly consider a life sentence is substantially impaired. He was wrong, however, to suggest that the majority's refusal to explicitly enunciate this right suggests that its premise was wrong. Rather, this refusal might best be explained by considering the facts of *Morgan*. At trial, defense counsel did not ask that the prospective jurors be examined regarding whether their ability to consider a life sentence was substantially impaired. Rather, trial counsel for the defense sought unsuccessfully to ask them: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" *Id.* at 723. Accordingly, the limited question before the Court in *Morgan* was whether a defendant is entitled to inquire whether prospective jurors will automatically vote for the death penalty.

36. *Id.* at 728.

37. *Id.* at 728, 732.

38. *Id.* at 734, n.8.

39. *But see* United States v. Webster, 162 F.3d 308, 341 (5th Cir. 1998) (emphasis added):

> In a capital sentencing context, there is the right to challenge for cause a juror whose views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. at 424 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). *The government has the right to challenge for cause those veniremen whose views in opposition to the death penalty will substantially impair their duty. Id.* As a corollary, *the capital murder defendant has a right to challenge for cause any juror who will automatically vote for the death penalty in every case* . . . .

See also infra notes 55, 61, 62.

If a prospective juror who has substantial difficulty considering a vote for death is biased, then certainly a prospective juror who has substantial difficulty considering a vote for life is also biased. As the majority in *Morgan* stated, "due process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment."[40]

Thus, these decisions of the United States Supreme Court should be read to hold that capital jurors who manifest an inability to follow their state's capital punishment scheme, including fair consideration of the penalties authorized by the scheme, are challengeable for cause. These decisions also suggest that the judicial determination of whether or not such prospective jurors are challengeable for cause must be based on their views of capital punishment in the abstract, and not under the facts of the case to be tried. Indeed, these decisions appear to indicate that prospective jurors may not be challenged for cause because they are unwilling to consider a particular penalty under the facts and circumstances of the case to be tried.

II. LOWER COURTS HAVE ISSUED CONFLICTING DECISIONS AS TO WHEN PROSPECTIVE JURORS CAN BE CHALLENGED FOR CAUSE.

As explained in the introduction, the decisions of the United States Supreme Court should be read to hold that prospective jurors cannot be excused for cause if they are able to follow their state's capital punishment scheme, including fair consideration of the penalties authorized by the scheme, and that the judicial determination of whether the jurors are capable of following the scheme must be made without regard to the prospective jurors' views of the appropriateness of a particular penalty given the facts and aggravating and mitigating circumstances of the case to be tried by them. However, lower courts have not consistently interpreted the controlling precedent in this manner.[41]

First, while lower courts have freely followed *Witt* and allowed the prosecution to challenge for cause prospective jurors whose willingness to consider a death sentence is substantially impaired, courts have been extraordinarily resistant to allowing the defense to challenge for cause prospective jurors whose ability to fairly consider a life sentence is substantially impaired.[42] These courts have read

40. *Morgan*, 504 U.S. at 727.

41. The California Supreme Court has stated that "[t]he United States Supreme Court has not decided whether a juror who affirms only that he would automatically vote against death in the case before him can be excluded for cause." People v. Fields, 673 P.2d 680, 697 (Cal. 1983).

42. *See, e.g.*, United States v. Hall, 152 F.3d 381, 409 (5th Cir. 1998); Ramsey v. Bowersox, 149 F.3d 749, 758 (8th Cir. 1998); Gardner v. Norris, 949 F. Supp. 1359, 1370 (E.D. Ark. 1996); State v. Chester, 724 So. 2d 1276, 1286, 1290 (La. 1998) ("[W]e do not find that Ms. Galloway expressed an unconditional willingness to impose a death penalty under any and all circumstances.") ("After consideration of the application for rehearing, we choose to make abundantly clear that the standard by which we determine that potential juror Galloway was not properly excludeable for cause was . . . [whether she] 'will automatically vote the death penalty *under the factual circumstances of the case before [her].*'") (citation omitted); State v. Trull, 509 S.E.2d 178 (N.C. 1998); State v. Williams, 679 N.E.2d 646 (Ohio 1997); State v. Lungren No. 90-L-15-140, 91-L-036, 1993 WL 346444, (Ohio App. 11 Dist. September 14, 1993); McCarty v. State, 977 P.2d 1116 (Okla. Crim. App. 1998); State v. Barone, 969 P.2d 1013 (Or. 1998).

Morgan narrowly, as requiring only the exclusion of prospective jurors who will automatically vote for the death penalty and not those whose ability to consider a life sentence is substantially impaired.

Second, the lower courts (sometimes the same lower courts) have issued wildly conflicting decisions with respect to whether prospective jurors are challengeable for cause based on their willingness to impose a particular sentence in the case to be tried (as opposed to in the abstract). Particularly in more recent decisions, many courts read *Witt* broadly to permit the prosecution to challenge for cause prospective jurors based on their willingness to impose a death sentence under the facts of the case to be tried, but read *Morgan* narrowly to prohibit the defense from challenging for cause prospective jurors based on their willingness to impose a life sentence under the facts of the case to be tried.

What follows is an explication of these conflicting lower court decisions addressing case-specific death/life qualification. For purposes of clarity, the decisions are divided into different categories and subcategories and are considered in light of language from precedent of the United States Supreme Court.

One category of decisions (Category I) has held that neither the prosecution nor the defense may ask prospective jurors case-specific questions during the death/life qualification.[43] This holding can be traced to language in many of the Court's decisions.[44]

Employing the same reasoning, another category of (mostly older) decisions (Category II), while not necessarily prohibiting case-specific questioning during voir dire,[45] has held that neither the prosecution nor the defense may challenge for cause prospective jurors based on their unwillingness to impose a particular sentence in the case to be tried, particularly when it is the mitigating circumstances that preclude consideration of capital punishment. In *Lewis v. State*, the Georgia Supreme Court held that six veniremen were improperly excluded because they stated that they could not impose the death penalty on a sixteen-year-old defendant.[46] The Court reasoned:

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43. *See, e.g.*, Kuenzel v. State, 577 So. 2d 474, 485 (Ala. Crim. App. 1990) ("[W]here the death penalty is a possibility, the trial judge should examine the prospective jurors to ascertain whether any of them would clearly vote either for or against the death penalty regardless of the evidence"), *aff'd*, 577 So. 2d 531 (Ala. 1991), *cert. denied*, 502 U.S. 886 (1991); Blankenship v. State, 365 S.E.2d 265, 268 (Ga. 1988) ("[N]either the defendant nor the state has the right simply to outline the evidence and then ask a prospective juror his opinion of that evidence"), *cert. denied*, 488 U.S. 871 (1988); Armstrong v. State, 214 So. 2d 589 (Miss. 1968) (death/life qualification should be in the abstract and not refer to facts of case to be tried); State v. Yelverton, 434 S.E.2d 183, 188 (N.C. 1993) ("Jurors should not be asked what kind of verdict they would render under certain named circumstances"); State v. Bedford, 529 N.E.2d 913, 920 (Ohio 1988) (trial court properly refused to allow state and defendant to ask case-specific questions during death/life qualification voir dire); Sellers v. State, 809 P.2d 676, 682 (Okla. Crim. 1991) ("To permit such [case-specific] questioning would make voir dire an open forum for discussion of any circumstances accompanying the murder, both mitigating and aggravating").

44. *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968) ("[A] prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him").

45. Some states allow case-specific questioning to ensure the intelligent exercise of peremptory challenges. *See, e.g.*, Balfour v. State, 598 So. 2d 731, 755-56 (Miss. 1992); Hart v. State, 612 So. 2d 520 (Ala. Crim. App. 1992), *aff'd* 612 So. 2d 536 (Ala. 1992).

46. Lewis v. State, 268 S.E.2d 915 (Ga. 1980).

> Veniremen who are irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the trial, may be excluded for cause. But veniremen who are not irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances "cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment." [*citing Witherspoon*]. A venireman cannot be excluded for cause simply because he indicates that he would refuse to recommend capital punishment for a 16-year-old. [citation omitted] . . . . The jury must be allowed to consider mitigating circumstances [citations omitted]. Age (youth) is a mitigating circumstance. Yet here the state was permitted to strike for cause those veniremen who would have given utmost consideration to the mitigating factor of the age of the appellant . . . . A simple illustration explains the problem. If the state were permitted to exclude for cause those veniremen who said they could not impose the death penalty upon a sixteen year old with no prior criminal record who was an orphan, all veniremen who would consider that the mitigating circumstances outweighed the aggravating circumstances could be excluded by the state for cause.[47]

The reasoning of Category II decisions also would appear to be rooted in *Witherspoon's* statement that "a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for [a particular] penalty in the case before him."[48] In addition, the Eighth Amendment would appear to prohibit the prosecution from challenging for cause prospective jurors who are unwilling to impose a death sentence because of the mitigating circumstances of the case to be tried. As stated in the introduction, in *Eddings v. Oklahoma*, the United States

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47. *Id.* at 918-19. *See also* Green v. Zant, 715 F.2d 551, 556 (11th Cir. 1983):

> [A potential juror's] refusal to impose a death sentence in this case stemmed from her determination of the inappropriateness of such a penalty *on the facts of this case* rather than a general refusal to impose the death penalty in any case. Certainly it would violate a criminal defendant's due process rights were a court to dismiss a juror because of her refusal to impose the death penalty in a given case.

People v. Pinholster, 824 P.2d 571, 591-92 (Cal. 1992) (potential jurors may not be excluded for cause based on their responses to case-specific questions regarding their willingness to impose particular penalty) (*citing* People v. Clark, 789 P.2d 127, 136 (Cal. 1990) ("The *Witherspoon-Witt* . . . voir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract, to determine if any, because of opposition to the death penalty, would 'vote *against* the death penalty without regard to the evidence produced at trial'") (citations omitted)); Monserrate v. State, 271 N.E.2d 420, 423 (Ind. 1971) (potential juror who could not vote for death penalty for 16-year-old improperly excluded for cause); Fuselier v. State, 468 So. 2d 45, 54-55 (Miss. 1985) (trial court improperly granted challenge for cause of two jurors who were hesitant to impose death penalty under facts of circumstantial evidence case); State v. Debler, 856 S.W.2d 641, 646 (Mo. 1993) ("juror who under some of the hypothetical facts of the case would vote one way or the other is not subject to disqualification for cause"); State v. Ramseur, 524 A.2d 188, 257 (N.J. 1987) (New Jersey allows case-specific questions but "[j]urors must not be asked categorically to prejudge their willingness to impose the death penalty in the case"); State v. Holland, 283 A.2d 897, 902 (N.J. 1971) (six jurors improperly excluded for cause because they could not return death sentence against defendant who, while participating in felony murder, did not do actual killing); Wilson v. State, 863 S.W.2d 59, 68 (Tex. Crim. App. 1993) (trial court erred in granting State's challenge for cause of potential juror "because he could not answer the second issue solely based upon the circumstances of the offense before him").

48. Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968).

Supreme Court held that, under the Eighth Amendment, it must be the "sentencer [who] determine[s] the weight to be given relevant mitigating circumstances."[49]

Category III decisions hold that the prosecution and the defense[50] may challenge for cause prospective jurors who are willing to consider a particular penalty only in "impossible" or highly-limited circumstances.[51] Their reasoning can be traced to the Court's modification in *Witt* of its holding in *Witherspoon*.[52] In *Witherspoon*, the Court held that only prospective jurors who made unmistakably clear that they were unalterably opposed to capital punishment regardless of the facts and circumstances could be excluded for cause.[53] In *Witt*, the Court ruled that the standard for juror exclusion is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[54] Category III decisions have reasoned that the ability of prospective jurors to apply the law is substantially impaired when they can vote for a particular penalty only in specific, highly unlikely scenarios, or under "impossible circumstances."

Category IV decisions begin to more directly address case-specific questioning of prospective jurors. These decisions deal with challenges for cause by both the defense and the prosecution of prospective jurors who would automatically vote for a particular penalty given the circumstances of the offense and/or the aggravating circumstances in the case to be tried. This category may be divided into two subcategories: Subcategory IV(a) addresses defense challenges and Subcategory IV(b) addresses prosecution challenges. Although a few decisions from Louisiana in Subcategory IV(a) have held that the defense can challenge for cause prospective jurors who are opposed to voting for a life sentence given the circumstances of the offense and/or the aggravating circumstances in the case

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49. Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982). *See also supra* notes 9, 11.

50. The overwhelming majority of these cases involve challenges for cause by the prosecution of prospective jurors who stated that they would vote for a death sentence only in highly-limited circumstances. A few cases use language that would apply to the defense.

51. *See* Riles v. McCotter, 799 F.2d 947, 949-50 (5th Cir. 1986) (potential juror properly excluded when that potential juror would vote life in any case where victim not brutally butchered); People v. Payton, 839 P.2d 1035, 1043 (Cal. 1992) (potential juror who could vote death only "in the most aggravated case you can imagine" properly excluded for cause); People v. Ganus, 594 N.E.2d 211, 215 (Ill. 1992) (potential juror properly excluded for cause even though equivocated in response to defense counsel's unrealistic hypothetical of heinous crime); Davis v. State, 487 N.E.2d 817, 820 (Ind. 1986) (potential jurors properly excused for cause when they could only vote death in some extreme cases); Wiley v. State, 484 So. 2d 339, 344 (Miss. 1986) (potential juror properly excluded for cause when he could consider death penalty only if his wife and three children were killed); State v. Debler, 856 S.W.2d 641, 646 (Mo. 1993) ("juror who would consider one of the two penalties only under impossible circumstances is subject to disqualification"); State v. Jones, 749 S.W.2d 356, 361 (Mo. 1988) (two potential jurors properly excluded for cause when one would require overwhelming evidence of guilt to impose death and another would not vote for death if no eyewitnesses); State v. Koedatich, 548 A.2d 939, 975-76 (N.J. 1988) (juror who stated he would vote for life if any mitigating circumstances whatsoever, properly excluded for cause); State v. Ramseur, 524 A.2d 188 (N.J. 1987) (potential juror properly excluded for cause because she could only impose death penalty if brutal death of child); Rojem v. State, 753 P.2d 359, 363-64 (Okla. 1988) (potential juror who could impose death only in certain extreme hypothetical situations suggested by defense counsel properly excluded for cause); Villarreal v. State, 576 S.W.2d 51, 62 (Tex. Crim. App. 1978) (potential juror properly excluded for cause when the potential juror could vote death penalty but "it would have to be some case").

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

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

54. *Wainwright*, 469 U.S. at 424.

to be tried,[55] most courts have held to the contrary[56] and, indeed, a large number have held that the defense may not even ask case-specific questions under *Morgan*.[57] On the other hand, the many decisions in Subcategory IV(b) have held that the prosecution can challenge for cause prospective jurors who are unalterably opposed to capital punishment given the circumstances of the offense and/or the aggravating circumstances of the case to be tried.[58] These Subcategory IV(b) decisions have reasoned that, because the law authorizes the death penalty in the case to be tried, prospective jurors who cannot impose it in that case are unable to apply the law. In addition to the language in *Witt* discussed above, these decisions have found support for their position in *Witherspoon's* statement that "[t]he most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law . . . ."[59]

Decisions in Category V address whether the prosecution and the defense may challenge for cause prospective jurors whose willingness to vote for a particular sentence is substantially impaired by the circumstances of the offense and/or the aggravating circumstances of the case to be tried. Again, courts have refused to permit the defense to challenge for cause prospective jurors whose willingness to consider a life sentence is substantially impaired, on the ground that *Morgan*

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55. *See* State v. Maxie, 653 So. 2d 526, 538 (La. 1995) (trial court erred in denying defendant's challenge of prospective juror who would not consider life sentence because case involved rape and murder; "potential juror who indicates that she will not consider a life sentence and will automatically vote for death penalty under the factual circumstances of the case before her is subject to a challenge for cause by the defendant") (citing Robertson v. State, 630 So. 2d 1278, 1284 (La. 1994) (same)); State v. Williams, 550 A.2d 1172, 1184 (N.J. 1988) (juror who cannot credit mitigation if offense is a rape/murder cannot sit; "a juror who will not, or cannot, consider relevant mitigating evidence pertaining to the defendant because the crime involves rape and murder is 'substantially impaired' under the *Adams-Witt* test"); arguably, the decision in *Morgan v. Illinois*, 504 U.S. 719 (1992), fits in Subcategory IV(a) given that the Court held that the defense had a right to question prospective jurors whether they would automatically vote for the death penalty in a contract killing and given that the contract-nature of the killing was an aggravating circumstance. *See Id.* at 743 (Scalia, J., dissenting). *See also infra* at n. 82.

56. *See, e.g.*, Smith v. State, 698 So. 2d 189 (Ala. Crim. App. 1996), *aff'd*, 698 So. 2d 219 (Ala. 1997); People v. Brown, 665 N.E.2d 1290 (Ill. 1996); People v. Hope, 658 N.E.2d 391 (Ill. 1995). *Compare* Sadler v. State, 977 S.W.2d 140 (Tex. Crim. App. 1998).

57. *See* United States v. McVeigh, 153 F.3d 1166, 1207 (10th Cir. 1998) (and cases cited therein) ("Numerous courts have held *Morgan*-type questions objectionable when the question was predicated on facts specific to the case at issue or upon speculation as to what facts may or may not be proven at trial").

58. *See* Antwine v. Delo, 54 F.3d 1357, 1369-70 (8th Cir. 1995) (proper to exclude for cause a potential juror who "indicate[s] that only in a case like [the defendant's] could he not impose the death" penalty, even though "the source" of the "bias" of the excluded juror "was not the death penalty in the abstract, or in some irrelevant hypothetical case," but the specific facts of the case to be tried); United States v. Flores, 63 F.3d 1342, 1356 (5th Cir. 1995) (same); Williams v. Maggio, 679 F.2d 381, 385-86 (5th Cir. 1982) (en banc) (if potential juror knows enough about case to say she could not consider imposition of death penalty, "she must be excused"), *cert. denied*, 463 U.S. 1214 (1983); Taylor v. State, 672 So. 2d 1246 (Miss. 1996) (prospective jurors who could not consider death penalty in a circumstantial evidence case could be challenged for cause by the prosecution); People v. Fields, 673 P.2d 680, 698 (Cal. 1983) ("We . . . conclude that a court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases"), *cert. denied*, 469 U.S. 892 (1984); Jaggers v. Commonwealth, 439 S.W.2d 580, 585 (Ky. Ct. App. 1968) ("[T]he jurors excused for cause . . . stated that their scruples would prevent imposition of a death sentence by them *'in this case.'*") *rev'd sub nom.* Jaggers v. Kentucky, 403 U.S. 946 (1971); Stringer v. State, 500 So. 2d 928, 938 (Miss. 1986) (prospective jurors who stated that they could not consider death penalty for nontriggerman could be challenged for cause by the prosecution); Commonwealth v. Colson, 490 A.2d 811, 821 (Pa. 1985) (trial court did not err in excusing potential juror for cause because "[t]he testimony indicated that the prospective juror could not vote for the death penalty *under the facts of the case* and would not follow the court's instructions") (emphasis added), *cert. denied*, 476 U.S. 1140 (1986).

59. Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968).

requires only the exclusion of prospective jurors who will automatically vote for the death penalty and not those whose ability to consider a life sentence is substantially impaired. Accordingly, there is only one case, again from Louisiana, holding that the defense may challenge for cause prospective jurors whose ability to consider a life sentence is substantially impaired, given the circumstances of the offense and/or the aggravating circumstances of the case to be tried.[60]

However, a number of decisions hold that the prosecution may challenge for cause prospective jurors whose willingness to vote for a death sentence is substantially impaired by the specific circumstances of the offense and/or the aggravating circumstances of the case to be tried.[61] These decisions have wrongly construed *Witt's* modification of *Witherspoon's* holding. In *Witherspoon*, the Court held that veniremen could be excluded for cause only if they are unalterably opposed to capital punishment, regardless of the facts and circumstances.[62] In *Witt,* the Court held that, to be excused for cause, prospective jurors need not be unalterably opposed to capital punishment, regardless of the facts and circumstances; rather, it is sufficient if their opposition to capital punishment, regardless of the facts and circumstances, would substantially impair their ability to apply the law.[63] The mistake these decisions make is that, under *Witt*, it is not the prospective jurors' willingness to impose a death sentence that must be substantially impaired, but their ability to apply the law.[64] The decisions have failed to explain what legal provisions prospective jurors are substantially impaired from applying. All state capital punishment schemes allow (and, under the Eighth Amendment, must allow) prospective jurors discretion to make a determination of the appropriate sentence based on their reasoned moral response to the facts and circumstances of the offense.[65]

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60. State v. Divers, 681 So. 2d 320, 324 and n.5 (La. 1996) ("If a prospective juror's inclination toward the death penalty would substantially impair the performance of the juror's duties, a challenge for cause is warranted"). *But see* State v. Chester, 724 So. 2d 1276, 1290 (La. 1998) ("After consideration of the application for rehearing, we choose to make abundantly clear that the standard by which we determine that potential juror Galloway was not properly excludeable for cause was . . . [whether she] 'will automatically vote the death penalty under the factual circumstances of the case before [her].'") (citation omitted).

61. *See* People v. Visciotti, 825 P.2d 388, 410 n.16 (Cal. 1992) (dicta) ("[t]he question to be resolved under *Witherspoon* and its progeny is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror") (emphasis added), *cert. denied*, 506 U.S. 893 (1992); Scales v. State, 655 So. 2d 1326 (La. 1995) (unpublished appendix) (potential jurors may be excused for cause if ability to impose death in case to be tried substantially impaired in light of aggravating circumstances to be presented); Taylor v. State, 672 So. 2d 1246, 1264 (Miss. 1996) (four venirepersons properly excluded for cause because they "probably" could not impose the death penalty when "there were no eyewitnesses or fingerprints linking the defendant to the crime.").

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

63. Wainwright v. Witt, 469 U.S. 412 (1985).

64. *Id.*

65. *See supra* note 9.

The decisions in Category VI have considered whether prospective jurors are challengeable for cause because they would automatically vote for a particular sentence in light of the mitigating circumstances in the case to be tried. This category must be divided into subcategories, with Subcategory VI(a) addressing defense challenges and Subcategory VI(b) addressing prosecution challenges. No decisions in Subcategory VI(a) have held that the defense may challenge for cause prospective jurors who, given the mitigating circumstances in the case to be tried, would automatically vote for the death penalty. Rather, numerous recent decisions in this subcategory have, however, prohibited the defense from even seeking to question prospective jurors about their willingness to consider the individual mitigating circumstances to be presented at the possible capital sentencing phase.[66] Moreover, a number of decisions in this subcategory have held that the defense may not challenge for cause prospective jurors who are unwilling to consider the mitigating circumstances in the case to be tried.[67] These decisions have held that the sole issue under *Morgan* is whether the prospective jurors will vote for a death sentence in every case, and defendants cannot exclude prospective jurors who will not consider the specific mitigating circumstances in the case to be tried. For example, in *United States v. McCullah*, the United States Court of Appeals for the Tenth Circuit held:

> In *Morgan v. Illinois*, (citation omitted) the Supreme Court held that a juror who would automatically vote for the death penalty in every case was not impartial

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66. *See* United States v. McVeigh, 153 F.3d 1166, 1207 (10th Cir. 1998) (and cases cited therein); United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996); United States v. Tipton, 90 F.3d 861, 879 (4th Cir. 1996) ("Because we conclude that the district court's inquiry into death penalty attitudes was sufficient to cull out any prospective juror who would *always* vote for the death penalty whatever the circumstances, we cannot find error in the court's refusal to conduct or allow further detailed inquiry about specific mitigating factors"); People v. Terrell, 708 N.E.2d 309 (Ill. 1998); Holland v. State, 705 So. 2d 307, 338 (Miss. 1997) (holding that the trial court properly sustained the prosecution's objection to the following question by defense counsel to prospective jurors: "If the defendant was to raise the fact that there was alcohol possibly consumed or alcohol involved in this case would you rule that out as a mitigating factor prior to passing on the life without parole or a death penalty"); State v. Kreutzer, 928 S.W.2d 854 (Mo. 1996); State v. Skipper, 446 S.E.2d 252 (N.C. 1994), *cert. denied*, 513 U.S. 1134 (1995); State v. Wilson, 659 N.E.2d 292, 301 (Ohio 1996) (defendant was not entitled to voir dire prospective jurors about specific mitigating circumstances; "a juror need not give any weight to any particular mitigating factor although instructed to consider such factors"); State v. Hill, 501 S.E.2d 122 (S.C. 1998).

67. *See, e.g.*, Foster v. State, 639 So. 2d 1263, 1277 (Miss. 1994) (only issue under *Morgan* is whether veniremen were in favor of death penalty in every case); State v. Landrum, 559 N.E.2d 710, 724 (Ohio 1990) ("Clearly, jurors cannot be challenged because they do not individually believe in every one of seven statutory mitigating factors"); Heiselbetz v. State, 906 S.W.2d 500, 508-09 (Tex. Crim. App. 1995) (trial courts not required to exclude for cause potential jurors who will give no weight to specific mitigating circumstances). Louisiana v. Chester, 724 So. 2d 1276 (La. 1998) (trial court did not err in refusing to grant defendant's challenge for cause of prospective juror who stated that she would not consider a statutory mitigating circumstance). *See also* Morgan v. Illinois, 504 U.S. 719, 744 n.3 (1992) (Scalia, J., dissenting) ("[I]t 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* factor—*e.g.*, 'extreme mental or emotional disturbance' . . .—is not mitigating"; under the Court's decision in *Morgan* "a juror who thinks a 'bad childhood' never mitigating must . . . be excluded"). *But see* State v. Cross, 658 So. 2d 683, 687 (La. 1995) (discussing, but not ruling on defendant's claim that trial court erred in denying defendant's challenge for cause of prospective juror who would not consider "depression as a mitigating circumstance").

> because the presence of aggravating or mitigating factors was irrelevant to such a juror . . . . The district court was not required, as Mr. McCullah suggests, to allow inquiry into each juror's views as to the specific mitigating factors as long as the voir dire was adequate to detect those in the venire who would *automatically* vote for the death penalty.[68]

By contrast, the many decisions in Subcategory VI(b) have held that the prosecution may challenge for cause prospective jurors who are unalterably opposed to a death sentence because of the mitigating circumstances in the case to be tried. Despite precedent of the United States Supreme Court stressing that prospective jurors must be given discretion to accord mitigating circumstances whatever weight they deem appropriate,[69] these decisions have failed even to acknowledge any difference between prospective jurors who will not vote death because of the circumstances of the offense and/or the aggravating circumstances in the case to be tried and prospective jurors who will not vote death because of the mitigating circumstances in the case. These decisions have merely reasoned that, because the law does not erect an absolute bar to the death penalty if one or more mitigating circumstances are proven, prospective jurors who are unwilling to impose death if the mitigating circumstances are proven cannot apply the law.[70] Thus, in *Magill v. Dugger*, the Eleventh Circuit reasoned:

> Florida's sentencing statute provides that age is a mitigating circumstance. It does not state that a defendant's minority is a complete bar to capital punishment. Consequently, the statute allows for cases in which aggravating and mitigating circumstances balance in favor of imposing the death sentence on a juvenile. Mrs. Bonner indicated, however, that if she faced such a case, she would

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68. United States v. McCullah, 76 F.3d 1087, 1113-14 (10th Cir. 1996).

69. *See supra* notes 4, 9, 11, 14.

70. *See* People v. Kirkpatrick, 874 P.2d 248, 257 (Cal. 1994) (en banc), *cert. denied*, 514 U.S. 1015 (1995) ("prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of the aggravating and mitigating circumstances, is therefore subject to challenge for cause . . . ."); People v. Fudge, 875 P.2d 36, 45 (Cal. 1994) (en banc) (same), *cert. denied*, 514 U.S. 1021 (1995); People v. Davis, 794 P.2d 159, 207 (Colo. 1990):

> [A]lthough the juror . . . may determine what weight to give . . . [mitigating] evidence, the juror is still required to follow the requirements of our statute and weigh the aggravating circumstances against the mitigating circumstances. For a prospective juror to state that in any case involving the use of alcohol, no matter how little, the juror will not return a death sentence, is to admit that such juror would not follow the law of this state . . . . Our legislature has not recognized the use of alcohol, no matter how inconsequential, as an absolute mitigating factor forbidding the imposition of a death sentence . . . .

Henyard v. State, 689 So. 2d 239, 246 (Fla. 1996), *cert. denied*, 118 S. Ct. 130 (1997) (prospective juror properly dismissed because he stated that he could not recommend death sentence for the defendant because of his young age); Magill v. State, 386 So. 2d 1188 (Fla. 1980), *aff'd*, Magill v. Dugger, 824 F.2d 879, 895-96 (11th Cir. 1987); Lewis v. State, 268 S.E.2d 915, 921 (Ga. 1980) (Nichols, J., dissenting) (veniremen who cannot impose death penalty on 16-year-old unable to "'consider all of the penalties provided by state law'"). Cannaday v. State, 455 So. 2d 713, 719 (Miss. 1984) (two prospective jurors properly excluded for cause because they would not vote for death penalty for 16-year-old regardless of what evidence showed); State v. Davis, 422 S.E.2d 133, 139 (S.C. 1992) (trial court properly excused for cause prospective juror who "stated unequivocally during voir dire that she would never impose the death penalty on a mentally retarded defendant, no matter how egregious the crime and how slight the mental retardation"); Garcia v. State, 919 S.W.2d 370, 389 (Tex. Crim. App. 1994) (same); State v. Martin, 703 P.2d 309, 312 (Wash. Ct. App. 1985) (same); State v. Comeaux, 514 So. 2d 84, 94 (La. 1987) (same).

> not vote for the death penalty . . . . Clearly, Mrs. Bonner was unwilling to apply Florida's criminal statutes as written and therefore she was properly excluded from appellant's jury.[71]

Although this reasoning has a surface appeal, it suffers from two logical flaws. The reasoning proceeds as follows: (1) *Witt* allows for the exclusion of prospective jurors who are unable to apply the law. (2) The law does not prohibit a death sentence when a specific mitigating circumstance is proven. (3) Therefore, prospective jurors who cannot vote for a death sentence when a specific mitigating circumstance is proven cannot apply the law. The reasoning's first flaw is that it mischaracterizes the very law it seeks to uphold. No state capital punishment scheme in this country precludes (or could preclude under the Eighth Amendment)[72] a petit juror from voting against a death sentence because of the existence of a mitigating circumstance, because jurors are entitled to assign any weight they deem appropriate to mitigating circumstances. Accordingly, jurors who will vote for a life sentence after finding a mitigating circumstance are in no sense unable to apply the law.

This reasoning's second flaw is the one identified in *Lewis*. If prospective jurors can be excluded for cause because they will vote for a life sentence if the defendant proves his mitigating circumstances, then, in the words of the Georgia Supreme Court, "all veniremen who would consider that the mitigating circumstances outweighed the aggravating circumstances could be excluded by the state for cause."[73]

Decisions in Category VII address challenges for cause of prospective jurors whose willingness to return a particular sentence is substantially impaired in light of the mitigating circumstances in the case to be tried. No cases permit such challenges by the defense. A number of cases, however, permit the prosecution to challenge for cause prospective jurors whose ability to fairly consider a death sentence is substantially impaired by the mitigating circumstances in the case to be tried.[74] The holdings in these decisions clearly violate the dictates of the Eighth and Fourteenth Amendments. Even assuming *arguendo* that states may properly conclude that prospective jurors can be excused for cause when trial courts fairly find that they are unalterably opposed to the death penalty if

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71. Magill v. Dugger, 824 F.2d 879, 896 (11th Cir. 1987).

72. *See supra* notes 9, 14.

73. Lewis v. State, 268 S.E.2d 915, 919 (Ga. 1980).

74. *See* State v. Sparks, 708 P.2d 732, 735 (Ariz. 1985) (prospective juror properly dismissed because of reservations about imposition of death penalty given the defendant's youth); State v. Williams, 708 So. 2d 703, 712 (La. 1998) (finding that trial court properly excused for cause prospective juror who would give "too much" weight to mitigating circumstance; "We, like our sister states who have addressed the issue, hold that when a potential juror indicates his or her attitude regarding the mitigating circumstances would substantially impair his or her ability to return the death penalty, then the juror is properly excludeable for cause"); State v. Tart, 672 So. 2d 116, 123 (La. 1996) (prospective juror properly dismissed because of reservations about returning a death sentence when defendant mentally ill); State v. Taylor, 669 So. 2d 364 (La. 1996) (unpublished appendix) (holding that prospective jurors can be excused for cause if ability to impose death in case to be tried substantially impaired in light of mitigating circumstances to be presented); State v. Richardson, 923 S.W.2d 301, 309 (Mo. 1996) (en banc), *cert. denied*, 117 S. Ct. 403 (1996) (prospective juror properly excused because of reservations about returning the death penalty given that defendant was an accomplice and was young); State v. Frost, 727 So. 2d 417, 423 (La. 1998) ("when a potential juror indicates during voir dire that he may afford too much weight to any one particular mitigating circumstance, such that his ability to return the death penalty would be substantially impaired, then that juror is properly excluded for cause").

specific mitigating circumstances are proven, states may not exclude for cause prospective jurors whose willingness to vote for a death sentence will merely be substantially impaired if the defendant establishes mitigating circumstances. Mitigating circumstances, of course, *mitigate against the death penalty.*[75] Therefore, mitigating circumstances, if proven, *are supposed to* inhibit the willingness of a juror to impose a death sentence. And that inhibition may properly rise to the level of substantial impairment because jurors are free to assign whatever weight they deem appropriate to mitigating circumstances. Thus, even assuming *arguendo* that some lower courts have correctly held that the inhibiting effect of mitigating circumstances may not result in an unalterable opposition to a death verdict, under the Eighth Amendment, mitigating circumstances must certainly be allowed to substantially impair jurors' willingness to return a death sentence. Accordingly, a juror whose willingness to impose a death sentence is substantially impaired by the existence of one or more mitigating circumstances is a juror who can readily perform his duties as a juror in accordance with his instructions and his oath, and therefore cannot be excluded under the *Witt* standard.[76] As stated by the dissent in one of these decisions:

> [a]lthough Rice may have indicated that she might potentially favor a life sentence if presented with mitigating evidence that Tart suffered from a mental defect, she did not indicate that she would not apply the law . . . [and] was not substantially prevented by her views from the "performance of [her] duties as a juror in accordance with [her] instructions and [her] oath."[77]

III. LOWER COURTS HAVE MISINTERPRETED UNITED STATES SUPREME COURT DECISIONS AND HAVE ISSUED OPINIONS THAT PRODUCE JURIES UNCOMMONLY WILLING TO SENTENCE A PERSON TO DIE.

As the introduction to this Article establishes, the pertinent United States Supreme Court decisions should be read to hold that the question whether a prospective juror can be removed for cause during "death/life qualification" voir dire is to be determined by considering whether the juror's views of capital punishment would prevent or substantially impair the juror from following the state's capital punishment scheme. The issue for the Court has not been whether the

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75. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978).

76. *See* State v. Tart, 672 So. 2d 116 (La. 1996) (Lemmon, J., dissenting, joined by Chief Justice Calogero).

77. *Id.* at 141 (Calogero, C.J., dissenting from denial of application for rehearing) (citations omitted). In his extraordinary dissent to the denial of Tart's application for rehearing, Chief Justice Calogero of the Louisiana Supreme Court had the following to say:

> What makes this case even more troubling is that it reveals a serious inconsistency in the manner in which the Court has handled similar issues in death prosecutions depending on whether it is the state or the defendant which is complaining. The majority in this case rejects Tart's argument that Rice should not have been excused for cause, for the reason that we should defer to the judgment of the trial judge who ruled in favor of the state. Yet, quite recently in a case brought here in an interlocutory posture, *State v. Shareef Cousin*, 666 So. 2d 658 (La. 1996), in which the trial judge ruled on a similar issue in favor of the defendant (the judge refused to excuse for cause on *Witherspoon* grounds two potential jurors who were possibly sympathetic to the defense, yet not *Witherspoon*-excludable) the Court's majority showed no similar respect for the district court's judgment and overruled him in the midst of the trial.

prospective juror will consider a life or death sentence under the facts of the case to be tried.[78] Rather, the issue has been whether the prospective juror will always or almost always vote for a particular penalty regardless of the facts of the case to be tried. From its first pronouncement on the issue in *Witherspoon*, in which the Court stated that "a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him,"[79] to its most recent pronouncement in *Morgan*, in which the Court held that "a juror who *in no case* would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause,"[80] the Court has made clear that the inquiry depends on the prospective jurors' views of capital punishment in the abstract, and not their views of capital punishment given the facts and circumstances of the case to be tried.

Lower court decisions permitting the exclusion for cause of prospective jurors who will consider a penalty authorized by the state capital statute only in "impossible circumstances" may be logically supportable. It is doubtful that such jurors would be able to fairly consider the penalty. Prospective jurors who will consider a death sentence only in the most extreme and rare circumstances will not be able to fairly consider a death sentence. Similarly, prospective jurors who will consider a life sentence only in the most extreme and rare circumstances will not be able to fairly consider a life sentence.

However, the exclusion of prospective jurors who are willing to fairly consider a penalty in a variety of circumstances, but perhaps not under the circumstances of the case to be tried, should not be permitted. The purpose of "death/life qualification" voir dire is not to try the case. Rather, its purpose is to identify prospective jurors whose views of capital punishment, whether for or against, will prevent or substantially impair them from fairly considering the penalties authorized by the law, regardless of the facts and circumstances that may develop at trial. In addition, under modern Eighth Amendment jurisprudence, capital jurors are free to make an individual assessment of the appropriate penalty and to assign whatever weight they deem appropriate to aggravating and mitigating circumstances.[81] Prospective jurors who will automatically vote for a death sentence when the aggravating circumstance is a rape are not unable to follow the law if rape is an aggravating circumstance under the state capital punishment scheme.[82] Similarly, prospective jurors who will automatically vote for a life

78. *See supra* notes 27, 28, 29, 31 and accompanying text.

79. Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1967).

80. Morgan v. Illinois, 509 U.S. 719 (1992).

81. Tuilaepa v. California, 512 U.S. 967, 976-80 (1994) (jurors have unfettered discretion to consider aggravating and mitigating circumstances in determining the appropriate penalty).

82. In his dissent in *Morgan*, Justice Scalia made a similar point. 509 U.S. at 742-43. He explained that the defense in that case sought to ask prospective jurors whether they would automatically vote for the death penalty if they found the defendant guilty of a contract killing, correctly pointing out that the contract nature of the killing was an aggravating factor at the sentencing phase. He also stated that "Illinois law [does not] preclude[ ] a juror from taking a bright-line position that there are no valid reasons why a defendant who has committed a contract killing should not be sentenced to death." *Id.* at 743. He also stated: "It is important to bear in mind that the juror who will ignore the requirement of finding an aggravating factor is not an issue here." *Id.* at 743 n.1.

sentence when the defendant was under the influence of alcohol are not unable to follow the law because, under the Eighth Amendment, alcohol is a mitigating circumstance and jurors are free to assign whatever weight they deem appropriate to mitigating circumstances. The law directs jurors to a consideration of aggravating and mitigating circumstances when deciding the appropriate penalty. The law intends aggravating circumstances to impair jurors' willingness to impose life sentences, and mitigating circumstances to impair jurors' willingness to impose death sentences. Therefore, prospective jurors who state that specific aggravating and mitigating circumstances will prevent them from imposing or, impair their ability to impose, particular penalties are jurors who are capable, not incapable, of following the law.

Another criticism must be made of these lower court decisions. Although the United States Supreme Court has appeared to indicate that the *Witt* inquiry and the *Morgan* inquiry are essentially the same and intended to determine the ability of prospective jurors to follow the law impartially, the trend in lower courts is to treat the inquiries differently. Recently, lower courts have read *Witt* expansively to allow case-specific determinations of challenges for cause by the prosecution, but they have read *Morgan* narrowly to preclude case-specific determinations of challenges for cause by the defense. As demonstrated in the preceding section, numerous courts have permitted the prosecution to challenge for cause prospective jurors who express reservations about the appropriateness of the death penalty under the facts of the case to be tried, be it because of the aggravating circumstances of the case or the mitigating circumstances of the case. These courts have reasoned that because the state capital punishment statute authorizes the death penalty under the facts of the case to be tried, a prospective juror who cannot fairly consider this punishment under those facts is a prospective juror who is unable to follow the law. However, courts have almost universally refused to extend that reasoning to defense challenges for cause.

This double standard is truly dismaying and intellectually insupportable. If prospective jurors can be challenged for cause because they will not consider (or are substantially impaired in their ability to consider) a death sentence given the circumstances of the offense, the aggravating circumstances in the case to be tried and/or mitigating circumstances in the case to be tried, then they certainly must be excluded for cause if they are unwilling to consider (or are substantially impaired in their ability to consider) a life sentence given those factors. Moreover, if case-specific juror exclusion is permitted during death/life qualification, then the defense should be permitted to challenge for cause prospective jurors who are unable to fairly consider the individual mitigating circumstances in the case to be tried. The sole justification for this differing treatment would be that the Court in *Morgan* spoke only of prospective jurors who would automatically vote for the death penalty, while in *Witt* the Court spoke both of prospective jurors who would automatically vote for a life sentence and of prospective jurors whose ability to consider a vote for death was substantially impaired. But as stated earlier in this Article, the use of this different language does not justify the double standard. If, as *Witt* held, prospective jurors are biased and thus challengeable for cause by the prosecution when their ability to consider a vote for

death is substantially impaired; and if, as *Morgan* held, a capital defendant is entitled under the Due Process Clause to impartial jurors, then clearly prospective jurors whose ability to consider a vote for life is substantially impaired are also biased and must be challengeable for cause by the defense.

This double standard, moreover, leads inevitably to the selection of petit juries uncommonly willing to sentence a man to die. The appellate decisions discussed in this Article require trial courts to descend down a slippery slope in which they must decide whether jurors will have substantial difficulty imposing a death sentence based on the facts of the case to be tried. Prosecutors are permitted during voir dire to lay out the circumstances of the offense and the aggravating circumstances, and then ask prospective jurors if those circumstances will prevent them from imposing a death sentence or substantially impair them from doing so. If prospective jurors say yes, the trial court must grant the prosecutor's challenges for cause. Prosecutors are then permitted to lay out the defense's mitigating circumstances, and then ask prospective jurors if those mitigating circumstances will prevent them from imposing a death sentence or substantially impair them from doing so. Again, if prospective jurors say yes, the trial court must grant the prosecutor's challenges for cause. Thus, the only prospective jurors who are qualified to sit on petit juries in death penalty cases are those who are willing, without any serious reservations, to impose the death penalty given the circumstances of the offense and who might consider the defendant's mitigation, but will not let that mitigation stand in the way of a death sentence. The case, in effect, is tried during voir dire, with a death sentence a foregone conclusion. The result is precisely the pernicious result that the Court sought in *Witherspoon* to prevent: the selection in death penalty cases of only jurors "uncommonly willing to condemn a man to die."[83]

Furthermore, the trying of death penalty cases during voir dire, and the exclusion of prospective jurors based on their answers to case-specific questions about their willingness to impose a particular penalty under the facts of the case to be tried, is on a collision course with itself, particularly if appellate courts end their double standard and allow the defense to challenge for cause prospective jurors who are unwilling to vote life under the facts of the case to be tried or are substantially impaired from doing so. Prospective jurors will be challengeable for cause if their ability to consider either a life sentence or a death sentence is substantially impaired by the circumstances of the offense and/or by the aggravating and mitigating circumstances of the case to be tried. In other words, virtually all prospective jurors will be challengeable for cause.

The critical mistake made by lower courts is their conflation of the question whether prospective jurors can consider aggravating and mitigating circumstances with the question of what weight prospective jurors will assign aggravat-

83. *Witherspoon*, 391 U.S. at 521 (1967).

ing and mitigating circumstances. The parties should be permitted to ask prospective jurors whether they will fairly consider the aggravating and mitigating circumstances in the case to be tried. If prospective jurors are unable to fairly consider the aggravating and mitigating circumstances, then they should be challengeable for cause.[84] But prospective jurors should not be challengeable for cause because they indicate they are unwilling to fairly consider a particular penalty given the aggravating and mitigating circumstances in the case to be tried. Prospective jurors must be free to assign whatever weight they deem appropriate to aggravating and mitigating circumstances and to make an individualized assessment of whether the defendant deserves to live or die. Certainly, substantial reservations about a particular penalty in light of the aggravating and mitigating circumstances in the case to be tried should not be a ground for a cause challenge.

IV. CONCLUSION

The United States Supreme Court must address the issues raised by the farrago of wildly conflicting holdings elucidated in this Article, which is resulting in the exclusion of prospective jurors in death penalty cases on substantially different legal grounds. Specifically, the Court should state explicitly that the defense can challenge for cause prospective jurors whose ability to consider a life sentence is substantially impaired. The Court should also hold that prospective jurors cannot be excused for cause based on their views of the appropriateness of a particular penalty under the specific facts of the case to be tried. Clearly, the Court should put an end to the double standard currently being utilized by lower courts, under which the prosecution, but not the defense, can challenge for cause prospective jurors whose ability to consider a particular penalty is substantially impaired, and under which the prosecution, but not the defense, is permitted to challenge for cause prospective jurors based on their views of the appropriate punishment under the facts of the case to be tried. This double standard is a truly distressing development that is producing the organization of tribunals uncommonly willing to condemn a man to death.

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84. Thus, despite the numerous recent decisions to the contrary, the defense should be permitted to challenge for cause prospective jurors who are unable to fairly consider the individual mitigating circumstances in the case to be tried. That is not to say, however, that the defense should be permitted to challenge for cause prospective jurors who are unwilling to accord a specific mitigating circumstance a certain (or indeed any) weight.