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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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CAPTION: DERRICK MORGAN, Petitioner v. ILLINOIS

CASE NO: 91-5118

PLACE: Washington, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

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DERRICK MORGAN, :
Petitioner :
v. : No. 91-5118
ILLINOIS :
- - - - -X

Washington, D.C.
Tuesday, January 21, 1992

The above-mentioned matter came on for oral
argument before the Supreme Court of the United States at
1:29 p.m.

APPEARANCES:
ALLEN H. ANDREWS, III, ESQ., Springfield, Illinois;
on behalf of the Petitioner.
KENNETH L. GILLIS, ESQ., First Assistant State's
Attorney, Cook County, Chicago, Illinois;
on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (1:29 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 91-5118, Derrick Morgan v. Illinois.

5 Mr. Andrews, you may proceed.

6 ORAL ARGUMENT OF ALLEN H. ANDREWS, III

7 ON BEHALF OF THE PETITIONER

8 MR. ANDREWS: Mr. Chief Justice, and may it
9 please the Court:

10 The issue in this case is whether, in a capital
11 case, a defendant's right to an impartial jury requires a
12 trial court to inquire of potential jurors whether, if the
13 defendant is convicted of murder, they would automatically
14 impose a sentence of death at a subsequent sentencing
15 hearing.

16 The issue in this case arose at Mr. Morgan's
17 trial. The defendant asked the trial court to ask the
18 jurors, would you impose -- if you convict Derrick Morgan
19 of murder, would you impose a sentence of death no matter
20 what the facts are. The trial court declined, giving an
21 explanation that he had asked that question in
22 substantially similar form at some earlier time, but he
23 had not. At the State's request, the trial court did ask
24 the potential jurors whether they could never impose the
25 death penalty upon Mr. Morgan. Following those questions,

1 approximately 17 jurors were excused because they could
2 not sentence Mr. Morgan to death, or they said they could
3 not.

4 Mr. Morgan was convicted by the jury of murder,
5 and he was subsequently sentenced to death by that jury.
6 The Illinois supreme court affirmed both the conviction
7 and the death sentence. On this issue, it ruled that
8 there was no requirement to reverse Witherspoon in the
9 jury, in other words, to ask whether the jurors would
10 always impose death. It also held that because Mr. Morgan
11 could not demonstrate that any of the jurors were
12 prejudiced against him, that he was not entitled to any
13 relief. This Court granted certiorari to review that
14 decision.

15 Now, the Sixth Amendment and the due process
16 clause of the Fourteenth Amendment guarantee a defendant
17 an impartial sentencing hearing in a death penalty
18 proceeding. Automatic death penalty jurors, people who
19 would automatically impose death, cannot serve because
20 they cannot be impartial.

21 QUESTION: Is that question -- would that
22 question, is it really asking, will you -- would you
23 always impose a death penalty, even if you are instructed
24 to weigh mitigating and aggravating circumstances?

25 MR. ANDREWS: That question did not -- the form

1 of the question did not discuss the Illinois statute. It
2 did not discuss weighing --

3 QUESTION: So, in short, it does cover
4 that -- it does mean would you disobey your instructions.

5 MR. ANDREWS: Actually, it definitely does mean
6 would you disobey the instructions. That is all that the
7 defense was trying to find, was to discover whether jurors
8 were being seated who could not follow the law. And
9 indeed, that is the only thing that they wanted.

10 QUESTION: Well, let's assume they said, and
11 satisfied the court, yeah, we'll obey our instructions.
12 But then at the end of the weighing, there's all
13 these -- still an area of discretion, isn't there?

14 MR. ANDREWS: There's a tremendous amount of
15 discretion.

16 QUESTION: But the question wasn't just narrowed
17 to that.

18 MR. ANDREWS: The question was not narrowed as
19 to whether they could weigh aggravation or mitigation.

20 QUESTION: Or it wasn't narrowed to whether
21 where you have discretion, whether you would always vote
22 for the death penalty?

23 MR. ANDREWS: No, it wasn't. It was even
24 narrower than any of that. It was whether you would
25 always impose death, no matter what type of sentencing

1 procedure had been followed. It was not even as broad as
2 probably would have been allowed by decisions subsequent.

3 QUESTION: Well, I know, but if somebody, any
4 juror who said, I won't obey my instructions, is going to
5 be thrown off, isn't he? He's not going to answer yes to
6 that.

7 MR. ANDREWS: No, he's not going to say that he
8 would not obey the instructions. There's a tremendous
9 amount of pressure. And for that reason, these general
10 questions about whether or not you would obey the law, or
11 whether you can be fair, are not adequate to reveal
12 whether somebody would automatically impose the death
13 penalty.

14 QUESTION: Mr. Andrews, why do you say it
15 amounts to violating your instructions? I mean, I gather
16 the instructions are, you know, given your assessment of
17 what is mitigating, you should let him off. But if a
18 juror says, hey, I am really -- I am a hard nose, and I
19 would not allow any mitigation for this kind of -- why is
20 that disobeying the instruction? He is just telling the
21 judge, that's the way my judgment works. That's not
22 disobeying the instruction, is it?

23 MR. ANDREWS: You're right. It does not require
24 them to disobey the law. They're told in Illinois that
25 the death penalty will be imposed unless mitigation

1 outweighs aggravation. Well, to jurors such as these, the
2 mitigation will never outweigh the aggravation. They
3 believe that death should automatically be imposed, so
4 therefore they will never find enough mitigation to
5 preclude the imposition of the death penalty.

6 QUESTION: And it's your position that there's
7 nothing in these instructions that the State can point to
8 to counter the effect that you fear.

9 MR. ANDREWS: No, there is absolutely nothing in
10 the instructions, because that is precisely what they are
11 told, that they have that discretion, and it is pure
12 weighing. And there is no -- the Illinois supreme court
13 has said that there is no burden of proof upon the State,
14 so they can do whatever they want, as long as they weigh
15 the mitigation. And even if --

16 QUESTION: Is a part of your submission,
17 Mr. Andrews, kind of sauce for the goose, sauce for the
18 gander, that since the State is entitled to ask
19 Witherspoon/Witt types of questions to jurors to see if
20 they would ever impose the death penalty, you should be
21 able to ask similar questions kind of pointing in the
22 other direction?

23 MR. ANDREWS: That is part of our argument. We
24 don't demand absolute equality, but in an issue of this
25 importance, where the State is allowed to exclude, as in

1 this case, perhaps 17 people, we do think that fundamental
2 fairness requires that we should be able to discover the
3 opposite type of jurors, those jurors who would always
4 impose death.

5 QUESTION: Well, would your position be the same
6 if the Witherspoon question was not asked?

7 MR. ANDREWS: I believe that even if the State
8 does not Witherspoon, the defendant's interest in
9 obtaining an impartial jury is so significant that he
10 should, at his request, be entitled to have the judge
11 inquire of these jurors whether they would automatically
12 impose death.

13 If for some reason the State decides that they
14 do not care whether there are anti-death penalty people on
15 the jury, their decision should in no way force a
16 defendant to perhaps be tried by a jury composed of people
17 who would automatically impose death upon him.

18 QUESTION: Would you say you're entitled to have
19 a question asked of jurors, do you favor the death
20 penalty? Would you lean towards imposing the death
21 penalty in any case, or not?

22 MR. ANDREWS: No, Your Honor, we merely want a
23 question that would reveal whether they could, you know,
24 consider the mitigation and follow what the Constitution
25 requires, and not be automatic death penalty jurors.

1 QUESTION: Mr. Andrews, you mentioned
2 fundamental fairness. That's sort of a due process
3 standard, but you're also relying on the Sixth Amendment,
4 aren't you?

5 MR. ANDREWS: Yes, Your Honor.

6 QUESTION: How can you rely -- I thought we've
7 held, I know we've held, that the Sixth Amendment does not
8 apply to -- that there is no Sixth Amendment right to a
9 jury in the penalty phase of a trial.

10 MR. ANDREWS: Well, when there is a jury in the
11 penalty phase in the trial, when the trier of fact in the
12 penalty phase has to be impartial, and --

13 QUESTION: Well, that's a due process claim,
14 though, not a Sixth Amendment claim.

15 MR. ANDREWS: Even though there is no right to a
16 jury, it seems to me that when the State gives you the
17 right to a jury, that the jury has to be impartial, as
18 required.

19 QUESTION: Well, again, that's, it seems to me,
20 a due process assertion. I don't see how you can get to a
21 Sixth Amendment right to an impartial jury when there is
22 no Sixth Amendment right to a jury.

23 MR. ANDREWS: Well, this Court has specifically
24 held in *Turner v. Murray* that the Sixth Amendment applies.
25 There's the *Bollington v. Missouri* case that says that a

1 death penalty sentencing hearing is the equivalent of a
2 trial, and I would say that certainly supports the Sixth
3 Amendment application to the sentencing hearing.

4 QUESTION: I'm just saying I don't understand
5 it.

6 QUESTION: Well, it wouldn't hurt your feelings
7 to rely on due process, would it?

8 MR. ANDREWS: No, Your Honor, it wouldn't hurt
9 my feelings to rely on the equality argument, either. I
10 would just like some relief for Mr. Morgan.

11 Now, the risk -- there's a great risk that these
12 people will serve if this inquiry isn't made. Now, the
13 cases of Ross v. Oklahoma and Mu'Min v. Virginia,
14 automatic death penalty jurors appeared in there. There
15 are a large number of State cases where these people
16 appear. In June of 1991, there was a poll that said 76
17 percent of the population favor the death penalty, and
18 half of those believed in the concept of a life for a
19 life. So there are definitely people out there who will
20 do this, who will impose death automatically.

21 And furthermore, it is not, as the State perhaps
22 suggests, merely a question of numbers, it's a question of
23 logical consistency. These jurors are as unfit to serve
24 as a juror who would not impose the death penalty, and
25 logically we should be entitled to inquire --

1 QUESTION: I take it that in the State courts of
2 Illinois the judge voir dire the jury all the time?

3 MR. ANDREWS: The judge has absolute
4 discretion. He can allow the jurors to voir dire -- the
5 attorneys to voir dire if he sees fit. In this case, the
6 trial judge allowed absolutely no participation other than
7 to request questions. So the trial judge can preclude any
8 inquiry. And in this case the attorneys had no chance to
9 ask --

10 QUESTION: Would it have satisfied you if the
11 judge was willing to ask the jury, do you swear to follow
12 your instructions, including the instruction to weigh any
13 mitigating evidence against the aggravating evidence?

14 MR. ANDREWS: No, Your Honor.

15 QUESTION: Would that satisfy you?

16 MR. ANDREWS: No, Your Honor.

17 QUESTION: Why not?

18 MR. ANDREWS: . Because as was pointed out
19 earlier, these people might think that they're weighing
20 mitigation and aggravation, but they're not weighing it in
21 any meaningful manner as is contemplated by the
22 Constitution. What they do is they believe that no
23 mitigation can outweigh the aggravation. It is automatic.
24 Any weighing would be pointless. It is not meaningful as
25 the Constitution contemplates.

1 QUESTION: Well, how would your question bring
2 it out any more subtly or more discreetly?

3 MR. ANDREWS: It would just directly ask them.
4 They would know what was required of them. Could
5 you -- they wouldn't even have to know what was required
6 of them. Would you automatically impose death? If they
7 answered yes, they would be removed from the venire, and
8 they could not be on the jury.

9 QUESTION: But you're going to find a fair
10 amount of people, I dare say, who answer no to that
11 question.

12 MR. ANDREWS: Yes.

13 QUESTION: And yet are very likely to find that
14 the aggravating circumstances outweigh the mitigating
15 circumstances.

16 MR. ANDREWS: Well, we're not arguing that the
17 death penalty can't be imposed in suitable cases.

18 QUESTION: Would it have satisfied you if the
19 judge says, well, I'll ask this amended question. Would
20 you, despite your instructions to the contrary, always
21 impose the death penalty?

22 MR. ANDREWS: That would, I believe, satisfy me,
23 because that would reveal that these people would always
24 impose a death penalty. However, that question is not the
25 reverse of the Witherspoon question.

1 Ideally, what would be asked is would you always
2 impose it, and they would answer. And if there was some
3 problem with the type of answer that they gave, if there
4 was some ambiguity, then the trial judge would continue it
5 and explore it more.

6 QUESTION: But our law does not prevent them
7 from always imposing the death penalty. We don't say that
8 a juror must weigh and be able to come out with a result
9 against the death penalty. A juror who always comes out
10 with a death penalty is a perfectly acceptable juror, as
11 far as our case law is concerned. He just has to be given
12 the opportunity to weigh. We don't say that he must have
13 at least a reasonable possibility of coming out in favor
14 of the defendant. If he wants to weigh and come out that
15 way, he must be allowed to do so.

16 MR. ANDREWS: What the case law has said is that
17 weighing has to be meaningful. Now, if he's automatically
18 going to impose death, his weighing is not meaningful, and
19 he is not --

20 QUESTION: Where does it say that it must be
21 meaningful? I don't -- I think there has to be a
22 meaningful opportunity as far as the restrictions placed
23 on the juror are concerned, but I don't think we've ever
24 said that the juror has to be someone who will have a
25 reasonable possibility of coming out that way.

1 MR. ANDREWS: Well, the defendant has a right to
2 present mitigation. Now, to effectuate that right, he has
3 to be able to present it to jurors who will pay attention
4 to it. Otherwise, it's an absolutely meaningless right.

5 QUESTION: Why is that? Suppose I'm the type of
6 juror who -- I just really don't like any hearsay
7 evidence, including some hearsay evidence that comes in
8 under exceptions to the hearsay rule, and I'm just not
9 persuaded by that kind of evidence. Do I have to be
10 excused?

11 MR. ANDREWS: Yes, because you cannot follow the
12 law to --

13 QUESTION: No, the law tells me to give it
14 whatever weight I think it's entitled to. In my view of
15 the thing, I think this kind of evidence is entitled to
16 zero weight. I'm not a bad juror for that, am I?

17 MR. ANDREWS: I'm not saying that these are bad
18 people, or anything of that nature. I'm saying they are
19 not fit to be jurors. It's a very logical position in its
20 own way, that death should be automatic following a
21 murder. But the defendant's right to present this
22 mitigation to defend his life is meaningless if these
23 jurors are on the jury. And if these jurors were fit,
24 this Court would not have held in *Ross v. Oklahoma* that a
25 death sentence must be vacated if there's even one juror

1 on the sentencing jury.

2 QUESTION: Were you trial counsel?

3 MR. ANDREWS: No, I was not.

4 QUESTION: Have you tried death cases?

5 MR. ANDREWS: No death murder cases, Your Honor.

6 QUESTION: How often would you predict that some
7 juror is going to answer yes to your question?

8 MR. ANDREWS: I would have no way of predicting.
9 I mean, certainly couldn't tell from this record, since
10 the question wasn't asked. But it seems to me the kind of
11 question that isn't necessarily -- shouldn't be based --

12 QUESTION: You speak about these people as
13 though they were really quite a group of people.

14 MR. ANDREWS: I honestly couldn't tell you how
15 large a group of people there are. I would say that
16 perhaps as the death penalty becomes increasingly popular
17 that they would become more common. But again, the
18 defendant's right to preserve his life is pretty well
19 ruined when such an individual serves on the jury. And
20 whether there are a lot or a few, the question is whether
21 can -- will some of them possibly be seated? And they
22 definitely will, and that is what all of these cases show.
23 So it's not necessarily a question of how many there are,
24 or are there as many as would not impose death.

25 QUESTION: At least we knew there was one in

1 Ross v. Oklahoma.

2 MR. ANDREWS: Yes, and there was one in Mu'Min.
3 And in Ross it was, the juror said, I can be fair. And
4 then they asked him, but would you always impose death?
5 And he said, oh, yes, I would. I wouldn't consider a
6 lesser sentence. So that case is a perfect example of
7 where the fairness question, or the following the
8 instructions wouldn't apply, because they don't really
9 know what fairness involves, or what the law involves in
10 the future. You need to ask this question. That tells
11 them what the law is, and that is what allows them to make
12 an honest answer. And they don't find themselves on the
13 jury.

14 Now, in addition to the number of people who
15 actually might or might not be out there, there's just a
16 tremendous amount of prejudice resulting from a people's
17 serving on this. Because these people have already
18 decided the ultimate issue in this case. It's not like
19 race or bias against beards or any of the other biases, it
20 goes to the ultimate issue. A racist might acquit
21 somebody, even though he does not like their race. He
22 might do it. But this is a person -- it's a bias of an
23 entirely different type. They don't think there's
24 anything wrong with it. They will never, ever, you
25 know --

1 QUESTION: Well, what about a person who is
2 perfectly willing to follow the instructions, but if they
3 were questioned, they said, you know, I really am not much
4 moved at all by this evidence of an abused childhood. You
5 know, I had an abused childhood. I rose above it. I
6 think it's all a lot of bunk as mitigating circumstance.
7 If they want to put in some other kind of mitigating
8 evidence, that's fine, but that just doesn't move me at
9 all. Should he be excludable?

10 MR. ANDREWS: No, because he can consider the
11 mitigation, he just does not give a certain type that much
12 weight. Perhaps if he said, absolutely, I would refuse to
13 consider the mitigation, perhaps he should be excluded.
14 But realistically, you're not allowed to inquire of these
15 jurors what type -- about the type of mitigation you might
16 present. We just want to know whether --

17 QUESTION: Isn't that going to be the next step
18 if we rule in your favor?

19 MR. ANDREWS: No. No, I do not believe that it
20 would be, because this goes to the ultimate issue of
21 whether they can just absolutely follow the law. It is
22 the ultimate issue. That is a prejudice against a certain
23 type of evidence. It is not outcome determinative of
24 itself. He could consider other mitigation and not impose
25 death, or he can consider that mitigation and give it very

1 little weight. This just goes to the ultimate issue. It
2 is just like the Witherspoon juror.

3 QUESTION: Of course, if there are one of these
4 persons who, if you didn't have your question asked and
5 there was one of these always will give the death penalty
6 people on the jury, of course, he couldn't control the
7 verdict just by voting for the death penalty alone.

8 MR. ANDREWS: No. Certainly not in Illinois,
9 where it requires a unanimous jury.

10 QUESTION: And it's different on the other side,
11 though. In the Witherspoon case, in Illinois, a single
12 person could avoid a death -- could negate a death
13 penalty. Isn't that right?

14 MR. ANDREWS: Yes, that's absolutely true, and
15 that's the whole point of the statute. But it is not true
16 that that somehow -- well, first the State argues that
17 they have this greater interest than we do in discovering
18 the Witherspoon reasons for the purpose outlined in your
19 question, but their interest is really wholly irrelevant.
20 If our interest in discovering these jurors is great
21 enough, I'd be willing to concede to them that theirs is
22 10 times greater than ours. But as long as ours is great
23 enough to require the inquiry in this case, their interest
24 is absolutely irrelevant. It's just not logically equated
25 to this.

1 QUESTION: Are you so interested because you
2 would think that that single juror out of the 12 would be
3 able to unduly influence the other 11?

4 MR. ANDREWS: No, it is not a matter of undue
5 influence at all. What it is, is the structure of the
6 Illinois death penalty statute, where one juror can
7 preclude the imposition of the death penalty. So the way
8 it works is you've got 12 shots at saving your life.

9 QUESTION: And if this one person wasn't so hide
10 bound, he might be the person to vote against it.

11 MR. ANDREWS: Exactly. And the more people you
12 have on, the fewer chances you have. And the fact that
13 each juror can prevent it makes each individual juror a
14 very crucial person.

15 QUESTION: And you say the Constitution requires
16 that you have 12 shots at this rather than just 11 or
17 10 or whatever?

18 MR. ANDREWS: I'm not saying that the
19 Constitution requires any number of jurors or anything.
20 I'm saying that the statute should -- that the State's
21 point about the statute, that their interest is greater,
22 is absolutely incorrect, because the statute is designed
23 to make the death penalty difficult to impose, and that
24 each of these jurors should not be able to -- should have
25 the opportunity to preclude it, and that the automatic

1 death penalty people don't.

2 QUESTION: Well, I think if you're talking
3 about a Sixth Amendment right to a jury and an impartial
4 jury, I think that argument may go. But if you're just
5 talking about fundamental fairness, it doesn't seem to me
6 fundamentally unfair to allow this decision to be made by
7 12 individuals, some of whom may have this attitude, even
8 though others don't.

9 MR. ANDREWS: Well, if that is the position of
10 this Court, the next cases you're going to see is what
11 about with three of these people on the jury? What about
12 with six? And we'll be fine-tuning that for a long time.

13 QUESTION: Do I understand you're making the
14 rather extreme argument that you're entitled to have all
15 12 jurors unbiased?

16 MR. ANDREWS: Yes, exactly. Just as if in a
17 trial, you know, no one would ever say that a racist was
18 entitled to sit on a jury for guilt merely because the
19 other 11 jurors would have to agree with him to convict.
20 It's just not done.

21 QUESTION: For making the rather extreme
22 argument that you are a biased juror if your particular
23 view, which is not unlawful, of a crime is that this crime
24 deserves the death penalty, and I will listen to the
25 evidence of aggravating and mitigating circumstances, Your

1 Honor, but I will tell you now, with this kind of a crime,
2 I will always find in favor of the death penalty.

3 Is there anything unlawful about that?

4 MR. ANDREWS: Yes, they cannot consider
5 mitigation. It's not a crime per se, but they are not fit
6 to be jurors.

7 QUESTION: They consider it. They just come
8 down against your client.

9 MR. ANDREWS: Well, they don't meaningfully
10 consider it. They just -- if they as much as told the
11 judge before they've heard it that they're not going to
12 give the guy any consideration about it, they're not going
13 to consider the mitigation. That's about as much as I can
14 really say on that subject. It's just that if they're
15 announcing in voir dire that it's always going to be
16 death, there is no consideration that follows in the
17 sentencing hearing.

18 Now, given the fact that in Ross v. Oklahoma
19 this Court has said that these jurors shouldn't serve, it
20 would seem to me that perhaps the State's greatest
21 interest in this case would be to allow this inquiry so
22 that we don't have to keep coming back in collateral
23 proceedings in the future to overturn these convictions.
24 Because if we don't get to voir dire these jurors on this
25 subject, the only time we can find out about whether they

1 would automatically, or did automatically, impose a death
2 penalty is years later in a collateral proceeding, and
3 then the State's going to be in the posture of re-creating
4 these trials and finding their witnesses. And it seems to
5 me their best policy is to agree that we ought to have
6 this inquiry whenever the defendant asks for it.

7 QUESTION: I don't understand. How do you find
8 out in collateral proceedings?

9 MR. ANDREWS: You go and interview the actual
10 jurors and you ask them, were you -- did you believe that
11 you would automatically --

12 QUESTION: But will the judge allow you to
13 inquire into that?

14 MR. ANDREWS: This is after the trial. You
15 can't, like, do this on direct appeal. You have to wait
16 for the collateral proceedings and go out, and you
17 interview all of the witnesses, and you interview the
18 trial attorneys and the jurors. It's done all the time.
19 And it's so far perfectly permissible to interview the
20 jurors.

21 Now, as far as the other inquiry --

22 QUESTION: And the statement of the interviewer
23 is admissible in the collateral proceedings?

24 MR. ANDREWS: You could call the juror
25 themselves after they've talked to you.

1 Now, as far as a few more points on the State's
2 positions. Now, they argue that, you know, that the
3 fairness inquiry is adequate. But even the Illinois
4 supreme court has finally realized, after Mr. Morgan's
5 case, that direct inquiry -- there is no better way than
6 direct inquiry into this. And they have backed away from
7 their idea that these fairness questions can reveal it and
8 that the defendant is somehow required to show that the
9 jurors are prejudiced, even though he was never entitled
10 to ask about the subject matter.

11 And as far as the instruction about following
12 the law, here in this case, in the discretion of the trial
13 judge, he didn't even ask three of the jurors if they
14 could follow the law. So here, at a minimum, in this
15 case, the following the law was not adequate because they
16 were not even asked.

17 QUESTION: Mr. Andrews, how do you want this
18 question to be asked? Is it to be asked with reference to
19 the particular crime at issue? I mean, would you say in
20 the voir dire, you know, this is a case of the rape and
21 murder of a, you know, of a 15-year old, or something like
22 that? I mean, could you describe the exact crime before
23 you ask the question?

24 MR. ANDREWS: No. We do not seek that right at
25 all. We would seek, you know, Wainwright v. Witt, or

1 Witherspoon -- anything, no hypotheticals, no facts, just
2 direct inquiry on whether they could follow this crucial
3 area of the law. Would your belief that the death penalty
4 should be imposed, you know, interfere with your
5 performance of your duties as a juror?

6 QUESTION: Should be imposed for what? It's
7 hard for anybody to answer that question. I mean, what
8 crime are we talking about here? Shoplifting?

9 MR. ANDREWS: No, the death penalty. If you
10 convict Derrick Morgan of murder, would you automatically
11 impose a death sentence in this case? That would be fine.
12 I think that that would cover it.

13 QUESTION: What if the juror says, well, it
14 would depend on the nature of the murder? How, you know,
15 how gory and heinous it was.

16 MR. ANDREWS: I think that that is a juror who
17 can consider mitigation and who is not an automatic death
18 penalty juror. And if there was some doubt in the trial
19 court's mind, then he could inquire further.

20 QUESTION: And you don't think counsel would
21 follow up with, well, let me describe to you this murder,
22 and then the circumstances of the murder --

23 MR. ANDREWS: No, not in Illinois, because the
24 trial judge has complete discretion, and if he thinks that
25 the trial counsel is doing something that he shouldn't be

1 doing, then he would tell counsel to stop.

2 QUESTION: So you would just describe the nature
3 of the offense, murder, or whatever --

4 MR. ANDREWS: Yes. If you convicted Mr. Morgan
5 of murder, would you automatically impose death?

6 In conclusion, I would just state that because
7 of the importance of this issue to the defendant's right
8 to a fair sentencing hearing, and because the questions
9 were not asked in this case, that the judgment of the
10 Illinois supreme court should be reversed. And if there
11 were no further questions I'd like to reserve my remaining
12 time for rebuttal.

13 QUESTION: Thank you, Mr. Andrews.

14 Mr. Gillis, we'll hear from you.

15 ORAL ARGUMENT OF KENNETH L. GILLIS

16 ON BEHALF OF THE RESPONDENT

17 MR. GILLIS: Mr. Chief Justice, and may it
18 please the Court:

19 Petitioner asks for a per se rule here, which
20 would require all State trial judges in capital cases to
21 ask a particular form of questions to prospective jurors.
22 Except for the racial prejudice cases, Turner v. Murray,
23 capital cases, this Court has never required that of State
24 trial judges.

25 The area about the thoughts about the death

1 penalty was adequately opened by the trial judge here.
2 One juror, Benjamin Dexter's, views were extreme, and he
3 was excused from the jury. The trial judge's questions
4 adequately explored that area.

5 QUESTION: May I ask, on that juror, I gather
6 he's the one that said he would automatically impose the
7 death penalty if there were a conviction of first degree
8 murder?

9 MR. GILLIS: Well, he related, too, that a
10 friend's parents had been murdered, and he speaks somewhat
11 inaccurately, but I would say a fair reading of that is
12 that he would either put that person to death or perhaps
13 he was referring to the petitioner in this case.

14 QUESTION: The question I wanted to ask you is
15 supposing the juror, it comes out during the colloquy,
16 that he believed in the eye for an eye and a tooth for a
17 tooth, and that if there were ever a conviction for first
18 degree murder, he thought that nothing less than the death
19 penalty should be imposed. Would you think it would be an
20 appropriate challenge for cause to remove that juror?

21 MR. GILLIS: Yes, I do. Though I think that we
22 must look realistically at the whole situation of a trial.
23 The jurors don't know much about the case at this point,
24 just the charges and some of the names, the victim's name
25 and the defendant's name. It's only after they get the

1 complete set of instructions later on in the trial that
2 they would have their attention focused on the narrow
3 issue of aggravation and mitigation in this case.

4 QUESTION: May I carry my question one step
5 further? Agreeing that it would be appropriate challenge
6 for cause, do you think the Constitution would require
7 that a challenge for cause be granted on the facts I've
8 given you?

9 MR. GILLIS: No, I don't believe it's a
10 constitutional issue.

11 QUESTION: How then do you explain Ross?

12 MR. GILLIS: In Ross v. Oklahoma, that juror did
13 not sit, but a peremptory challenge was used.

14 QUESTION: Well, but I thought the Court made it
15 very clear that if that juror had been seated, that a
16 reversal would have been required under the Sixth and
17 Fourteenth Amendments.

18 MR. GILLIS: Well, I think that in Ross the
19 question was the whole make-up of the jury, whether the
20 jury was impartial, a kind of a factual inquiry about the
21 impartiality of that juror.

22 Take -- Darrell Huling in that case did not sit,
23 but as I recall, a peremptory had to be used and the Court
24 held that that upset the fairness of the mechanism in so
25 far as the jury selection.

1 QUESTION: Mr. Gillis, why did you answer yes to
2 Justice Stevens' question? Why was it a proper challenge
3 for cause?

4 MR. GILLIS: It may not be a constitutional
5 violation, but I think a judge using his discretion could
6 apply the Witt standard and say that this person was
7 impaired on that issue, that he may not be able to set
8 aside that view, and he may not be able to follow the law.
9 I think it's discretionary, however.

10 QUESTION: Well, it's discretionary, then, for
11 him to say, not necessary but discretionary for him to
12 say, something like this. The need for a deliberative
13 process implies the need for individuals who at least are
14 capable of going either way, depending on the evidence.
15 This individual is not capable. Therefore, I will excuse
16 for cause.

17 But are you saying that it's up to the judge to
18 determine whether that is in fact his standard for cause?
19 Because you said the judge didn't have to do it. You said
20 it was within the judge's discretion to excuse for cause.

21 MR. GILLIS: I think it is within his discretion
22 to rule whether this person is so impaired that the person
23 could not consider the issues in the case.

24 QUESTION: Well, are you saying, then, it would
25 also be within his discretion to say, I find that the

1 person in fact could not go in one direction regardless of
2 what the evidence would be, but in my judgment, as long as
3 this juror will consider the evidence before he comes to
4 the inevitable result, that is enough, and I will not
5 excuse for cause. Is that also your position?

6 MR. GILLIS: I think a leaning is not
7 necessarily enough, but --

8 QUESTION: Well, this isn't a leaning. The
9 judge concludes that no matter what the evidence is, the
10 juror can only go one way. For example, an eye for an
11 eye, a tooth for a tooth juror always is going to
12 impose -- vote for the death penalty if there is a
13 conviction. Are you saying that it is within the judge's
14 discretion to say it is constitutionally sufficient that
15 the juror will consider the evidence even though the
16 result of considering that evidence in that juror's case
17 is inevitable? Is that your position?

18 MR. GILLIS: I think if the juror, before
19 hearing the evidence, is locked into one point of view and
20 cannot give up that point of view, that that is not a
21 proper juror.

22 QUESTION: So that if the outcome is certain, if
23 no process of deliberation would change the result, then
24 the judge has to excuse for cause.

25 MR. GILLIS: If the judge makes that finding.

1 If he or she makes that finding, I would think so.

2 QUESTION: And does the Federal Constitution
3 require that result?

4 MR. GILLIS: I don't believe that that is in the
5 Sixth Amendment or the Fourteenth Amendment. It's a
6 matter that's been left to the discretion of the State
7 trial judges, and I think --

8 QUESTION: Well, if the Constitution doesn't
9 require it, then I don't understand your answer in this
10 Court when you have a Federal court trying to determine
11 what the State court must do. I just don't understand
12 your answer.

13 MR. GILLIS: I'm sorry. I -- my point is that
14 given this Court's jurisdiction, and given that this is a
15 State court, that it should be left to the discretion of
16 the trial judges, and not constitutionally mandated
17 through the Sixth and Fourteenth Amendments.

18 QUESTION: What if the State wants to ask
19 prospective jurors whether they would never be able to
20 impose a death penalty?

21 MR. GILLIS: I -- the form, I think they could
22 legitimately ask questions about attitudes about the death
23 penalty as Witt and Witherspoon have talked about.

24 QUESTION: Can the State require the trial judge
25 in Illinois to ask those questions, or such a question of

1 prospective jurors?

2 MR. GILLIS: Other than through persuasion, I
3 don't think the State can require it.

4 QUESTION: There is no constitutional
5 requirement that the State be allowed to do that?

6 MR. GILLIS: That's right. Other than the
7 opinions of this Court --

8 QUESTION: And you find nothing in the opinions
9 of this Court to suggest the contrary?

10 MR. GILLIS: That's right. It's only if the
11 process is done, as in Witherspoon, it must be done
12 fairly. Witherspoon restricted the State's right to
13 excuse, but I don't think that it requires this to be
14 done, this sort of questioning to be done.

15 QUESTION: Suppose we say that it is a violation
16 of the Federal Constitution for a juror who automatically
17 will vote for the death penalty to sit on the jury.
18 Suppose we say that. Do you lose this case?

19 MR. GILLIS: No, I don't think so. There is
20 still --

21 QUESTION: Because even though there is a
22 constitutional right to excuse that juror, you don't have
23 to provide a mechanism for discovering that bias?

24 MR. GILLIS: In Ross, the juror admittedly and
25 clearly said, I am always for the death penalty. We don't

1 have that situation here. We've got one juror --

2 QUESTION: What we're asking here is whether or
3 not there must be a mechanism to uncover and disclose that
4 bias.

5 MR. GILLIS: We have a mechanism here. The
6 trial judge opened up and explored the area. I don't
7 think there has to be a particular mechanism, a particular
8 form of words. And that, the Court has never ordered
9 that, except in the racial prejudice case or a situation
10 like Hamm v. South Carolina, where there were special
11 circumstances.

12 QUESTION: You rely on both the voir dire and
13 the instructions as being adequate to guard against any
14 juror who would automatically impose the death penalty.

15 MR. GILLIS: The whole trappings of a trial
16 court, the solemnity of it, the judge is there, the voir
17 dire, the introductory remarks, and the juror's oath that
18 he swears to follow the law and apply the law to the
19 facts, and then the instructions, which, in this case,
20 narrowed the discretion, that still there is discretion,
21 but it's vastly narrowed from the situation.

22 QUESTION: Well, can you point to anything
23 specific in the instructions that it would advise a juror
24 that it is his duty not to impose the death penalty
25 automatically?

1 MR. GILLIS: The instruction says if you find
2 any mitigating factor that you should not impose the death
3 penalty. That's on joint abstract, page 123.

4 QUESTION: You just --

5 MR. GILLIS: No.

6 QUESTION: What?

7 MR. GILLIS: That's correct.

8 QUESTION: What was your page, Mr. Gillis?

9 MR. GILLIS: 123. If you unanimously find, from
10 your consideration of all of the evidence -- now, that's
11 the no mitigating factor. The flip side of it is, if you
12 unanimously find from your consideration of all of the
13 evidence that there are no mitigating factors sufficient
14 to preclude the imposition of the death penalty, then you
15 should sign the verdict requiring the sentence of death.

16 QUESTION: Well, I suppose that the hypothetical
17 is that this juror says, I don't think there are ever
18 mitigating factors.

19 MR. GILLIS: Well, that's -- that may be a
20 matter that comes in the jury deliberation room once that
21 occurs.

22 QUESTION: But my point is there's nothing in
23 the instructions that would advise the juror that this was
24 an incorrect disposition on his part.

25 MR. GILLIS: Everything about the process,

1 including the instructions, directs the jurors to see if
2 they can find mitigation. If a person is so made up that
3 they just do not believe in this facts -- in this case
4 that there amounts to mitigation, then I think the juror's
5 within their right to vote for the death penalty. But
6 you're right, that nothing in particular points
7 out -- nothing in voir dire points out these decisions
8 which will come later. Although the judge did a thorough
9 job of explaining that first there'd be a finding of
10 guilt, innocence, and then there'd be a finding of
11 eligibility, and then there would be a finding about
12 aggravation and mitigation. So the jurors knew, and one
13 of the juror's answers mirrored the fact that he
14 recognized that decisions would be made later on down the
15 line, of which they did not know the facts at that point.

16 QUESTION: Mr. Gillis, can I give you just one
17 other hypothetical? I don't mean to push you too hard on
18 this, but I'm assuming a question whether the juror would
19 in all cases vote in favor of the death penalty in all
20 cases of first degree murder because that was his
21 conviction. And after the defendant's peremptory
22 challenges have been exhausted, say the interrogation of
23 the jurors revealed that there were 12 such people in the
24 panel, and they all got on the jury. Would you think that
25 would be consistent with the Federal Constitution?

1 MR. GILLIS: Well, it seems to me that there's a
2 basic core of fundamental rights in the Fourteenth
3 Amendment that that situation would cry out for relief.

4 QUESTION: I think it would, too, but why
5 wouldn't one do it, then? Because isn't the theory of it
6 that the 12 are not completely unbiased if they have that
7 fixed view on penalty?

8 MR. GILLIS: In the real world, we wouldn't be
9 able to -- there's nobody that stamps this person
10 automatically for death penalty.

11 QUESTION: No, but that person very candidly
12 says -- and there are such people out there. I don't
13 think anyone denies that there aren't some people who
14 believe very sincerely that this is the correct punishment
15 for --

16 QUESTION: But I think when they're in a trial
17 and they're directed by the judge that here are the
18 instructions, read the instructions, and they are informed
19 to follow the law, and follow their oath, that that
20 person's individual feelings would be placed in a very
21 secondary position to the solemn instructions of the law.

22 QUESTION: Well, I take it your answer is that
23 in my 12-person hypothetical, that would violate the
24 Constitution, but a one-person hypothetical would not.

25 MR. GILLIS: My answer is that it's -- and I

1 hope I'm not quibbling -- that it's not clear, with one
2 person, whether this person is that type of person that
3 would automatically --

4 QUESTION: But I'm assuming in my hypothetical
5 that the question is sufficiently unambiguous that you
6 find that it is that kind of person, that the person just
7 is the opposite of the Witherspoon-kind of person. Some
8 people are conscientiously opposed to the death penalty,
9 some people sincerely believe that it's the correct
10 punishment in every capital case. And I'm just saying if
11 you find one such person by a proper question, do you
12 think the Constitution permits that person to serve on the
13 jury?

14 MR. GILLIS: The question in a State court of
15 whether that violates fundamental fairness?

16 QUESTION: Yes.

17 MR. GILLIS: I do. I would not -- I wouldn't
18 let that person sit. But I think in the realistic setup
19 that we find ourselves in, that --

20 QUESTION: Suppose enough of the facts are
21 described. I mean, let's say Adolf Hitler is put on
22 trial, and the jury knows there is somebody who's been
23 guilty of the murder of millions of people. All right?
24 And you think it would be fundamentally unfair if all
25 12 jurors thought, gee, you know, I don't frankly care

1 what mitigation you want to put in, death penalty is
2 appropriate for this, and that's the way I'm going to
3 vote. That's a basically unfair trial?

4 MR. GILLIS: Well, no, I think in that case
5 we've assumed some knowledge about the facts, which raises
6 another issue.

7 QUESTION: Well, not all the mitigation. You
8 don't know anything about mitigation at all. All you know
9 is more than that it's first degree murder. You know the
10 number of murders. So you're relying on the fact that
11 only -- it's when you only know the degree of the crime,
12 is that it? You cannot know anything more than this is
13 murder. What if you tell them it's a murder of eight
14 people, and then you have a juror who says, if he killed
15 eight people, he ought to die. That's unfair.

16 MR. GILLIS: I think that the inquiry is about
17 whether they could keep an open mind, follow the
18 instructions that the judge gives them.

19 QUESTION: I can't keep an open mind if this
20 person has killed several million people. Does that make
21 me a biased juror?

22 MR. GILLIS: I think that juror is assuming
23 knowledge about the facts in the case.

24 QUESTION: Certainly -- by the way, Illinois
25 bifurcates the penalty hearing.

1 MR. GILLIS: Yes.

2 QUESTION: First into finding the statutory
3 aggravating circumstance, and his age?

4 MR. GILLIS: First, it's to find if he's
5 eligible --

6 QUESTION: Yes. And then the second phase is
7 whether or not --

8 MR. GILLIS: -- there's any mitigating factors.

9 QUESTION: Well, that phase, though, is for
10 deciding whether he will get the death penalty.

11 MR. GILLIS: That's correct.

12 QUESTION: And there the judge specifically
13 instructs him that they have a duty of following every
14 instruction.

15 MR. GILLIS: Yes. And this judge, particularly
16 he asked nine of the 12 jurors that question. One other
17 one said he would answer similarly to all the other
18 questions, and that the subject of following the law was
19 mentioned throughout the voir dire process in this case,
20 which had three venires brought to the courtroom.

21 If there are no other questions, we would ask
22 the Court to affirm the conviction and sentencing. I
23 thank you.

24 QUESTION: Thank you, Mr. Gillis.

25 Mr. Andrews, you have four minutes remaining.

1 REBUTTAL ARGUMENT OF ALLEN H. ANDREWS, III

2 ON BEHALF OF PETITIONER

3 MR. ANDREWS: Thank you, Your Honor.

4 Very briefly, in response to the question about
5 whether the State has a right to inquire of these people
6 whether they could indeed impose a death penalty, in
7 Lockhart v. McCree, this Court said that if these jurors
8 could not make a guilt/innocence decision because of their
9 feelings on the death penalty, ipso facto the State is
10 entitled to inquire as to whether or not they are
11 automatically against the death penalty. And that's all
12 we're saying here.

13 QUESTION: Was that dicta, do you suppose, in
14 that case?

15 MR. ANDREWS: It conceivably could have been,
16 but it is very persuasive, it makes sense. We're not here
17 to quibble with the State's right to exclude these jurors
18 who can't follow the law. And it fits with our position
19 that indeed if they can't follow the law, they shouldn't
20 be on the jury.

21 Now, the State also talked about the mechanisms
22 were in place --

23 QUESTION: The State's complaint in Witherspoon
24 was not that the juror would never impose the death
25 penalty at the penalty stage. It was rather that a jury

1 who was that much opposed to the death penalty would not
2 convict, right?

3 Now, the defect that you claim in this case
4 would not produce a juror who would come out the wrong way
5 on the guilt phase, would it?

6 MR. ANDREWS: Not according to the State, no.

7 QUESTION: Well, tell me, is the State wrong
8 about that? Why would a person who --

9 MR. ANDREWS: No, this Court has said that --

10 QUESTION: Am I going to convict somebody just
11 so I can impose the death penalty on somebody?

12 MR. ANDREWS: I would not think so, no.

13 QUESTION: I wouldn't think so.

14 MR. ANDREWS: No.

15 QUESTION: So Witherspoon is really a different
16 situation. You have a juror who cannot deliberate
17 impartially on the guilt phase.

18 MR. ANDREWS: That is only part of the
19 Witherspoon decision. But what is important is that when
20 they can't deliberate on any phase, you ipso facto get to
21 ask the question to reveal that. In any event, it is that
22 you get to ask the question, not what phase it is.

23 In this case, talking about the mechanism in
24 this case, one of the jurors said, equivocally, according
25 to the State, look, I'd always impose a death penalty.

1 Well, with the mechanism that was in place in this trial,
2 there was no further inquiry. The trial judge didn't ask
3 him what you mean, sir, or anything like that. Under the
4 trial court's discretion there was absolutely no further
5 inquiry, where at least -- because he didn't have to. If
6 he didn't --

7 QUESTION: Do you say that for every possible
8 challenge for cause there must be voir dire directed to
9 that possibility?

10 MR. ANDREWS: No. We would limit it to a case
11 like this where it just determines the ultimate issue
12 before the court, where they would give them the death
13 penalty. This is the ultimate issue. That makes it
14 different from race, beards, anything else.

15 QUESTION: How about bias or partiality?

16 MR. ANDREWS: Even with bias and partiality,
17 that's almost always covered in any event.

18 QUESTION: Well, but supposing a trial judge
19 didn't cover it? Do you say there would be constitutional
20 error for him not to allow some sort of a voir dire on
21 that subject?

22 MR. ANDREWS: It could be constitutional error.
23 That might go back to the special circumstances that might
24 be required that would indicate that there was some need
25 for the inquiry. But here, where it goes to the ultimate

1 issue, that is the special need. That is why we need the
2 inquiry with this specific type of bias.

3 No further questions? Thank you.

4 CHIEF JUSTICE REHNQUIST: Thank you,
5 Mr. Andrews.

6 The case is submitted.

7 (Whereupon, at 2:15 p.m., the case in the
8 above-entitled matter was submitted.)
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CERTIFICATION

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NO. 90-5118 - DERRICK MORGAN, Petitioner v. ILLINOIS

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BY Michelle Sanders

(REPORTER)