SUPREME COURT OF THE UNITED STATES

No. 91–5118

DERRICK MORGAN, PETITIONER *v.* ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

[June 15, 1992]

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

The Court today holds that a juror who will always impose the death penalty for capital murder is not "impartial" in the sense required by the Sixth Amendment; that the Constitution requires that *voir dire* directed to this specific "bias" be provided upon the defendant's request; and that the more general questions about "fairness" and ability to "follow the law" that were asked during *voir dire* in this case were inadequate. Because these conclusions seem to me jointly and severally wrong, I dissent.

The Court today reaffirms our oft-repeated holding that the Sixth Amendment (which is binding on the States through the Fourteenth Amendment) does not require a jury trial at the sentencing phase of a capital case. *Ante*, at 6. See *Clemons* v. *Mississippi*, 494 U. S. 738, 745–746 (1990); *Walton* v. *Arizona*, 497 U. S. 639, 647–649 (1990); *Cabana* v. *Bullock*, 474 U. S. 376, 385 (1986); *Spaziano* v. *Florida*, 468 U. S. 447, 464 (1984); see also *McMillan* v. *Pennsylvania*, 477 U. S. 79, 93 (1986) (no right to jury sentencing in noncapital case). In a separate line of cases, however, we have said that the exclusion of persons who merely "express serious reservations about capital punishment" from sentencing juries violates the right to an "*impartial* jury" under the *Sixth Amendment*. *Witherspoon* v. *Illinois*, 391 U. S. 510, 518 (1968); see also *Adams* v. *Texas*, 448 U. S. 38, 40 (1980); *Wainwright* v. *Witt*, 469 U. S. 412, 423 (1985). The two propositions are, of course, contradictory: If

capital sentencing is not subject to the Sixth Amendment jury guarantee, then neither is it subject to the subsidiary requirement that the requisite jury be impartial.

The Court effectively concedes that the Sixth Amendment does not apply here, relying instead upon the Due Process Clause of the Fourteenth Amendment, which it says requires that any sentencing jury be "impartial" *to the same extent* that the Sixth Amendment requires a jury at the guilt phase to be impartial. *Ante*, at 6–8. I agree with that. See *Gardner* v. *Florida*, 430 U. S. 349, 358 (1977) (plurality) (sentencing procedures must comply with the requirements of the Due Process Clause). I do not agree, however, that unconstitutional "partiality," for either Sixth Amendment or Fourteenth Amendment purposes, is established by the fact that a juror's standard of judgment—which he applies to the defendant on trial as he would to all others—happens to be the standard least favorable to the defense. Assume, for example, a criminal prosecution in which the State plans to prove only elements of circumstantial evidence *x*, *y*, and *z*. Surely counsel for the defendant cannot establish unconstitutional partiality (and hence obtain mandatory recusal) of a juror by getting him to state, on *voir dire*, that if, in a prosecution for this crime, elements *x*, *y*, and *z* were shown, he would always vote to convict. Such an admission would simply demonstrate that particular juror's standard of judgment regarding how evidence deserves to be weighed—and even though application of that standard will, of a certainty, cause the juror to vote to convict in the case at hand, the juror is not therefore "biased" or "partial" in the constitutionally forbidden sense. So also, it seems to me, with jurors' standards of judgment concerning appro-priateness of the death penalty. The fact that a particular juror thinks the death penalty proper *whenever* capital murder is established does not disqualify him. To be sure, the law governing sentencing verdicts says that a jury *may* give less than the death penalty in such circumstances, just as, in the hypothetical case I have propounded, the law

governing guilt verdicts says that a jury *may* acquit despite proof of elements *x*, *y*, and *z*. But in neither case does the requirement that a more defense-favorable option be left available to the jury convert into a requirement that all jurors must, on the facts of the case, be amenable to entertaining that option.

A State in which the jury does the sentencing no more violates the due process requirement of impartiality by allowing the seating of jurors who favor the death penalty than does a State with judge-imposed sentencing by permitting the people to elect (or the executive to appoint) judges who favor the death penalty, cf. *United States* v. *Grinnell Corp.*, 384 U. S. 563, 583 (1966); *United States* v. *Richards*, 737 F. 2d 1307, 1311 (CA4 1984), cert. denied, 469 U. S. 1106 (1985); *United States* v. *Thompson*, 483 F. 2d 527, 530–531 (CA3 1973) (Adams, J., dissenting); 2 W. LaFave & J. Israel, Criminal Procedure §21.4(b), p. 747 (1984) (adherence to a particular legal principle is not a basis for challenging impartiality of a judge). Indeed, it is precisely because such individual juror "biases" *are* constitutionally permissible that *Witherspoon* v. *Illinois* imposed the limitation that a State may not skew the makeup of the jury *as a whole* by excluding all death-scrupled jurors. 391 U. S., at 519–523.

In the Court's view, a juror who will always impose the death penalty upon proof of the required aggravating factors[1]

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[1]It is important to bear in mind that the juror who will ignore the requirement of finding an aggravating factor is not at issue here. Petitioner does not contend that the *voir dire* question he seeks is necessary because the death-inclined juror will not impartially make the strictly factual determination, at the first stage of Illinois' two-part sentencing procedure, that the defendant is *eligible* for the death

"will fail in good faith to consider the evidence of aggravating and mitigating circumstances *as the instructions require him to do*." *Ante*, at 9 (emphasis added); see also *ante*, at 18–19. I would agree with that if it were true that the instructions required jurors to deem certain evidence to be "mitigating" and to weigh that evidence in deciding the penalty. On that hypothesis, the juror's firm attachment to the death penalty would demonstrate an absence of the constitutionally requisite impartiality, which requires that the decisionmaker be able "conscientiously [to] apply the law and find the facts." *Witt*, *supra*, at 423; see also *Lockhart* v. *McCree*, 476 U. S. 162, 178 (1986); *Adams*, *supra*, at 45. The hypothesis, however, is not true as applied to the facts of the present case. Remarkably, the Court rests its judgment upon a juror's inability to comply with instructions, *without bothering to describe the key instructions*. When one considers them, it is perfectly clear that they do not preclude a juror from taking the view that, for capital murder, a death sentence is always warranted.

The jury in this case was instructed that "[a]ggravating factors are reasons why the Defendant should be sentenced to death"; that "[m]itigating factors are reasons why the Defendant should not be

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penalty because one of the statutorily required aggravating factors exists (in this case, the fact that the murder was a contract killing). Obviously, the standard question whether the juror can obey the court's instructions is enough to disclose that difficulty. Petitioner's theory—which the Court accepts, *ante*, at 15–16—is that the special *voir dire* question is necessary to identify those veniremen who, at the second, weighing stage, after having properly found the aggravating factor, "will never find enough mitigation to preclude imposing death." Brief for Petitioner 8.

sentenced to death"; that the jury must "consider all the aggravating factors supported by the evidence and all the mitigating factors supported by the evidence"; and that the jury should impose a death sentence if it found, "from [its] consideration of all the evidence, that there are no mitigating factors sufficient to preclude imposition of a death sentence," App. 122–123.[2] The instructions did not in any way further define what constitutes a "mitigating" or an "aggravating" factor, other than to point out that the jury's finding, at the death-eligibility stage, that petitioner committed a contract killing was necessarily an aggravator. As reflected in these instructions, Illinois law permitted each juror to define for himself whether a particular item of evidence was mitigating, in the sense that it provided a "reaso[n] why the Defendant should not be sentenced to death." Thus, it is simply not the case that Illinois law precluded a juror from taking the bright-line position that there are no valid reasons why a defendant who has committed a contract killing should not be sentenced to death. Such a juror does not "fail . . . to consider the evidence," *ante*, at 9; cf. Ill. Rev. Stat., ch. 38, ¶9–1(c) (Supp. 1990) ("The court . . . shall instruct the jury to consider any aggravating and any mitigating factors which are relevant . . ."); he simply

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[2]The Court attaches great weight to the use of the term "sufficient" in these instructions and in the governing statute. The Court views this term as implicitly establishing that the jurors *must* find some mitigation (how else, the Court reasons, could the jury determine whether there is "sufficient" mitigation?) *Ante*, at 18. The inference is plainly fallacious: A direction to a person to consider whether there are "sufficient" reasons to do something does not logically imply that in *some* circumstance he *must* find something to be a "reason," and must find that reason to be "sufficient."

fails to give it the effect the defendant desires.[3]

Nor can the Court's exclusion of these death-inclined jurors be justified on the theory that—regardless of what Illinois law purports to permit—the *Eighth Amendment* prohibits a juror from always advocating a death sentence at the weighing stage. Our cases in this area hold, not that the sentencer *must give effect to* (or even that he *must consider*)

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[3]The Court notes that the Illinois statute lists certain potentially mitigating factors, see Ill. Rev. Stat., ch. 38, ¶9–1(c) (Supp. 1990), and therefore concludes that the legislature "must have deemed [them] relevant" to the imposition of the death penalty. *Ante*, at 17. It is of course true that the listed factors are "relevant" in the sense that a juror "may" find them to be mitigating, ¶9–1(c), and also in the sense that the defendant must be allowed to introduce evidence concerning these factors. But the statute's permissive and nonexhaustive list clearly does not establish what the Court needs to show, viz., that jurors *must* deem these (or some other factors) to be actually "mitigating." The fact that the jury has the discretion to deem evidence to be mitigating cannot establish that there is an obligation to do so. Indeed, it is impossible in principle to distinguish between a juror who does not believe that *any* factor can be mitigating from one who believes that a *particular* factor—*e.g.*, "extreme mental or emotional disturbance," ¶9–1(c)(2)—is not mitigating. (Presumably, under today's decision a juror who thinks a "bad childhood" is never mitigating must also be excluded.) In any event, in deciding whether to vacate petitioner's sentence on account of juror impartiality—*i. e.*, on the basis that one or more of petitioner's jurors may have refused to follow the instructions—we must be guided, not by the instructions that (perhaps) *should* have been given (a question of state law which we have no authority to

the evidence offered by the defendant as mitigating, but rather that he must "not be *precluded* from considering" it, *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality) (emphasis added); *Bell* v. *Ohio*, 438 U. S. 637, 642 (1978) (plurality) (same). See also *Walton*, 497 U. S., at 652 (plurality) ("`[T]he requirement of individualized sentencing in capital cases is satisfied by *allowing* the jury to consider all relevant mitigating evidence'") (emphasis added) (quoting *Blystone* v. *Pennsylvania*, 494 U. S. 299, 307 (1990)); *Saffle* v. *Parks*, 494 U. S. 484, 490 (1990) ("the State cannot *bar* relevant mitigating evidence") (emphasis added); *McKoy* v. *North Carolina*, 494 U. S. 433, 442–443 (1990) ("each juror [must] be *permitted* to consider and give effect to mitigating evidence") (emphasis added); *Penry* v. *Lynaugh*, 492 U. S. 302, 318 (1989) (a State may not "*prevent* the sentencer from considering and giving effect to [mitigating] evidence") (emphasis added); *id.*, at 328 (jury must be "*provided with a vehicle* for expressing its `reasoned moral response' to that evidence in rendering its sentencing decision") (emphasis added); *Mills* v. *Maryland*, 486 U. S. 367, 375 (1988) (State may not impose any "*barrier* to the sentencer's consideration of all mitigating evidence") (emphasis added); *Turner* v. *Murray*, 476 U. S. 28, 34 (1986) (plurality) (sentencer "*must be free* to weigh relevant mitigating evidence") (emphasis added); *Roberts* v. *Louisiana*, 431 U. S. 633, 637 (1977) (mandatory death penalty statute is unconstitutional because it "does not *allow* for consideration of particularized mitigating factors") (emphasis added); *Woodson* v. *North Carolina*, 428 U. S. 280, 303 (1976) (plurality) (same); *Jurek* v. *Texas*, 428 U. S. 262, 271 (1976) (plurality) ("A jury must be *allowed* to consider . . . all relevant [mitigating] evidence") (emphasis added). Similarly, where the judge is the final sentencer we

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review), but by the instructions that *were* given.

have held, not that he *must* consider mitigating evidence, but only that he may not, on *legal* grounds, refuse to consider it, *Hitchcock* v. *Dugger*, 481 U. S. 393, 394, 398–399 (1987); *Eddings* v. *Oklahoma*, 455 U. S. 104, 113–114 (1982) (a sentencing judge may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence") (emphasis in original). *Woodson* and *Lockett* meant to ensure that the sentencing jury would function as a "link between contemporary community values and the penal system," *Witherspoon*, 391 U. S., at 519, n. 15; they did *not* mean to specify what the *content* of those values must be.[4] The "conscience of the community," *id.*, at 519, also includes those jurors who are not swayed by mitigating evidence.

The Court relies upon dicta contained in our opinion in *Ross* v. *Oklahoma*, 487 U. S. 81 (1988). *Ante*, at 8–9. In that case, the defendant challenged for cause a juror who stated during *voir dire* that he would automatically vote to impose a death sentence if the defendant were convicted. The trial court rejected the challenge, and Ross used a peremptory to remove the juror. Although we noted that the state appellate court had assumed that such a juror would not be able to follow the law, 487 U. S., at 84–85 (citing *Ross* v. *State,* 717 P. 2d 117, 120 (Okla. Crim. App. 1986)), we held that Ross was not deprived of an impartial jury because none of the jurors who actually sat on the petit jury was partial. 487 U. S., at 86–88. In reaching that conclusion, however, we expressed the view that had the challenged juror actually served, "the sentence would have to be overturned." *Id.*, at 85. The Court attaches great weight to this dictum,

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[4]The Court's only response to this point is the suggestion that it somehow rests upon my rejecting the *Woodson–Lockett* line of cases. *Ante*, at 16–17. That is not so, as my quotations from over a dozen *Woodson–Lockett* cases make painfully clear.

which it describes as "announc[ing] our considered view," *ante*, at 8–9. This is hyperbole. It is clear on the face of the opinion that the dictum was based entirely on the fact that the state court had assumed that such a juror was unwilling to follow the law at the pen-alty phase—a point we did not purport to examine indepen-dently. 487 U. S., at 84–85. The *Ross* dictum thus merely reflects the quite modest proposition that a juror who will not follow the law is not impartial.

Because Illinois would not violate due process by seating a juror who will not be swayed by mitigating evidence at the weighing stage, the Constitution does not entitle petitioner to identify such jurors during *voir dire*.

Even if I agreed with the Court, however, that jurors who will always advocate a death sentence for capital murder are not "impartial" and must be excused for cause, I would not agree with the further conclusion that the Constitution requires a trial court to make specific inquiries on this subject during *voir dire*.

In *Mu'Min* v. *Virginia*, 500 U. S. ___ (1991), we surveyed our cases concerning the requirements of *voir dire* and concluded that, except where interracial capital crimes are at issue, trial courts "retai[n] great latitude in deciding what questions should be asked on *voir dire*." *Id.*, at ___; see also *Ristaino* v. *Ross*, 424 U. S. 589, 594 (1976). We emphasized that our authority to require specific inquiries on *voir dire* is particularly narrow with respect to state-court trials, where we may not exercise supervisory authority and are "limited to enforcing the commands of the United States Constitution," *Mu'Min*, 500 U. S., at ___. We concluded, as a general matter, that a defendant was entitled to specific questions only if the failure to ask them would render his trial "fundamentally unfair," *id.*, at ___. Thus, we have held that absent some "special circumstance," *Turner*, *supra*, at 37, a

"generalized but thorough inquiry into the impartiality of the veniremen" is a constitutionally adequate *voir dire*. *Ristaino*, *supra*, at 598. Finally, we have long acknowledged that, in light of the credibility determinations involved, a trial court's finding that a particular juror is impartial may "be overturned only for `manifest error,'" *Patton* v. *Yount*, 467 U. S. 1025, 1031 (1984) (quoting *Irvin* v. *Dowd*, 366 U. S. 717, 723 (1961)); see also *Mu'Min*, *supra*, at ___.

Were the Court today extending *Witherspoon*'s jury-balancing rule so as to require affirmatively that a capital sentencing jury contain a mix of views on the death penalty, that requirement would of course constitute a "special circumstance" necessitating specific inquiry into the subject on *voir dire*. But that is not what petitioner has sought, and it is not what the Court purports to decree. Its theory, as I have described, is that a juror who will always impose the death penalty for capital murder is one who "will fail in good faith to consider the evidence of aggravating and mitigating circumstances *as the instructions require him to do*," *ante*, at 9 (emphasis added). Even assuming (contrary to the reality) that that theory fits the facts of this case (*i.e.*, that the instructions required jurors to be open to voting against the death penalty on the basis of allegedly mitigating circumstances), I see no reason why jurors who will defy this element of the instructions, like jurors who will defy other elements of the instructions, see *e.g.*, n. 1, *supra*, cannot be identified by more general questions concerning fairness and willingness to follow the law. In the present case, the trial court on *voir dire* specifically asked nine of the jurors who ultimately served whether they would follow the court's instructions even if they disagreed with them, and all nine answered affirmatively. Moreover, all the veniremen were informed of the nature of the case and were instructed that, if selected, they would be required to follow the court's

instructions; subsequently, all twelve jurors responded negatively to a specific question whether there was any reason why they did not think they could be fair and impartial in this case. These questions, which were part of an extensive *voir dire*, succeeded in identifying one juror who would be unable to follow the court's instructions at the penalty phase: The juror admitted that, because of the anger he felt over the murder of his friend's parents, his sentiments in favor of the death penalty were so strong that he did not believe he could be fair to petitioner at the sentencing hearing. Taking appropriate account of the opportunity for the trial court to observe and evaluate the demeanor of the veniremen, I see no basis for concluding that its finding that the 12 jurors were impartial was manifestly erroneous.

The Court provides two reasons why a specific question must be asked, but neither passes the most gullible scrutiny. First, the Court states that general questions would be insufficient because "such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial . . . ." *Ante*, at 15. In other words, jurors who would always impose the death penalty would be violating the instructions without realizing that that is what they are doing. It seems to me quite obvious that solution of this problem does not require a specific question of each juror, but can be achieved by simply changing the instructions so that these well-intentioned jurors will understand that an aggravators-always-outweigh-mitigators view is prohibited. The record does not reflect that petitioner made any objection to the clarity of the instructions in this regard.

Second, the Court asserts that the adequacy of general *voir dire* questions is belied by "[t]he State's own request for questioning under *Witherspoon* and *Witt*." *Ante*, at 14–15. Without such questioning, we

are told, "*Witherspoon* and its succeeding cases would be in large measure superfluous," *ante*, at 15. But *Witherspoon* did *not*, as this reasoning assumes, give the State a right to exclude jurors ("it is clear beyond peradventure that *Witherspoon* is not a ground for challenging any prospective juror," *Adams*, 448 U. S., at 47–48) and it is therefore quite impossible that anything we say on that subject today could render the holding of *Witherspoon* "superfluous." What the Court describes, *ante*, at 13, as a "very short step" from *Witherspoon*, *Adams*, and *Witt*, is in fact a great leap over an unbridgeable chasm of logic. *Witherspoon* and succeeding cases held that the State was not constitutionally *prevented* from excluding jurors who would on no facts impose death; from which the Court today concludes that a State is constitutionally *compelled* to exclude jurors who would, on the facts establishing the particular aggravated murder, invariably impose death. The Court's argument that because the Constitution requires one it must require the other obviously rests on a false premise.[5] In any event, the mere fact that Illinois sees fit to request one or another question on *voir dire* in order to discover one-result-only jurors cannot, as a logical matter, establish that more general questioning is *constitutionally inadequate* to

[5]If, as the Court claims, this case truly involved "the reverse" of the principles established in *Witherspoon* and the cases following it, *ante*, at 11, 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 reformulated standard we adopted in *Adams* and *Witt*. The Court's failure to carry its premise to its logical conclusion suggests its awareness that the premise is wrong.

do the job.

For similar reasons, I reject petitioner's argument that it is "fundamentally unfair" to allow Illinois to make specific inquiries concerning those jurors who will always vote against the death penalty but to preclude the defendant from discovering (and excluding) those jurors who will always vote in favor of death. Brief for Petitioner 14 (citing *Wardius* v. *Oregon*, 412 U. S. 470 (1973)). Even if it were unfair, of course, the State should be given the option, which today's opinion does not provide, of abandoning *Witherspoon*–qualification. (Where the death-penalty statute does not contain a unanimity requirement, I am confident prosecutors would prefer that to the wholesale elimination of jurors favoring the death penalty that will be the consequence of today's decision.) But in fact there is no unfairness in the asymmetry. By reason of Illinois' death-penalty unanimity requirement, Ill. Rev. Stat., ch. 38, ¶9–1(g) (Supp. 1990), the practical consequences of allowing the two types of jurors to serve are vastly different: A single death-penalty opponent can block that punishment, but 11 unwavering advocates cannot impose it. And more fundamentally, the asymmetry is not unfair because, under Illinois law as reflected in the statute and instructions in this case, the *Witherspoon*–disqualified juror is a lawless juror, whereas the juror to be disqualified under the Court's new rule is not. In the first stage of Illinois' two-part sentencing hearing, jurors *must* determine, on the facts, specified aggravating factors, and at the second, weighing stage, they *must* impose the death penalty for murder with particular aggravators if they find "no mitigating factors sufficient to preclude [its] imposition." But whereas the finding of aggravation is mandatory, the finding of mitigation is optional; what constitutes mitigation is not defined, and is left up to the judgment of each juror. Given that there will *always* be aggravators to be considered at the

weighing stage, the juror who says he will never vote for the death penalty, no matter what the facts, is saying that he will not apply the law (the classic case of partial-ity)—since the facts may show no mitigation. But the juror who says that he will always vote for the death penalty is *not* promising to be lawless, since there is no case in which he is by law *compelled* to find a mitigating fact "sufficiently mitigating." The people of Illinois have decided, in other words, that murder with certain aggravators will be punished by death, unless the jury chooses to extend mercy. That scheme complies with our (ever-expanding) death-penalty jurisprudence as it existed yesterday. The Court has, in effect, now added the *new* rule that no merciless jurors can sit.

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Sixteen years ago, this Court decreed—by a sheer act of will, with no pretense of foundation in constitutional text or American tradition—that the People (as in We, the People) cannot decree the death penalty, absolutely and categorically, for *any* criminal act, even (presumably) genocide; the jury must always be given the option of extending mercy. *Woodson*, 428 U. S., at 303–305. Today, obscured within the fog of confusion that is our annually improvised Eighth-Amendment, "death-is-different" jurisprudence, the Court strikes a further blow against the People in its campaign against the death penalty. Not only must mercy be allowed, but now only the merciful may be permitted to sit in judgment. Those who agree with the author of Exodus, or with Immanuel Kant,[6] must be banished from American

[6]See Exodus 21:12 ("He that smiteth a man, so that he die, shall be surely put to death"); I. Kant, The Philosophy of Law 198 [1796] (W. Hastie transl. 1887) ("[W]hoever has committed Murder, must *die*. . . . Even if a Civil Society resolved to dissolve itself with the consent of all its members[,] . . . the last Murderer

juries—not because the People have so decreed, but because such jurors do not share the strong penological preferences of this Court. In my view, that not only is not required by the Constitution of the United States; it grossly offends it.

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lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds . . .").