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Recent Developments: Morgan v. Illinois: Trial Court's Refusal to Inquire Whether a Potential Juror Would Automatically Impose the Death Penalty upon Conviction Was Inconsistent with the Due Process Clause of the Fourteenth Amendment

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ance pertaining to it. Accordingly, the court rejected the State's argument concerning the mother's statements and similarly rejected application of the present sense impression exception to the other three out-of-court statements made to the victim's sister and to the police officers.

The court of special appeals thus rejected each of the state's theories on admitting out-of-court statements made by a victim about his killer to rebut the battered spouse syndrome defense. Moreover, the highly prejudicial nature of the statements contributed to the court's conclusion. Overall, the opinion may be helpful to defense attorneys who raise the defense of battered spouse syndrome, self-defense, or hot-blooded provocation and must prevent the state from admitting out-of-court statements of the victims in rebuttal to such defenses. Most importantly, however, the opinion clarified the hearsay rules regarding verbal acts, state of mind, and present sense impression, and thus, sought to prevent their misuse by practitioners and trial judges in the future.

- Heather L. Ashbury

Morgan v. Illinois: TRIAL COURT'S REFUSAL TO INQUIRE WHETHER A POTENTIAL JUROR WOULD AUTOMATICALLY IMPOSE THE DEATH PENALTY UPON CONVICTION WAS INCONSISTENT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In *Morgan v. Illinois*, 112 S. Ct. 2222 (1992), the United States Supreme Court held that during *voir dire* in a capital offense case a defendant is entitled to challenge for cause and have removed a juror who would automatically impose the death penalty, irrespective of the facts of the case or the trial court's instructions. In so holding, the Court proposed a due process review standard which requires a trial court to question venire panels about their position on capital punishment.

In the state of Illinois, capital offense cases are tried in two phases. The same jury may determine both a defendant's guilt and the sentence, or the defendant may elect to waive sentencing by the jury. Upon conviction for a capital offense, a separate sentencing hearing is held to determine if aggravating and mitigating factors existed. A unanimous jury must find, beyond a reasonable doubt, that at least 1 out of 10 aggravating factors were present in order to sentence the defendant to death. The defendant is given the death penalty if the defendant is eligible and the jury unanimously finds no mitigating factors.

In 1990, Derrick Morgan was paid \$4,000 by an inner-city gang to kill a narcotics dealer who was also his friend. Morgan lured the victim into an abandoned apartment and shot him in the head six times. After weighing the aggravating and mitigating circumstances, an Illinois jury convicted the petitioner of first degree murder and sentenced him to death.

At trial in the Circuit Court for Cook County, State prosecutors invoked their rights under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), in which the United States Supreme Court held that a state may excuse for cause any venire members whose strong opposition to the death penalty would render them unable to impose death regardless of the circumstances. Consequently, the trial judge asked those eventually empaneled whether any would automatically vote against the death penalty, irrespective of the facts.

The trial judge denied a similar request by the defense for a "reverse-*Witherspoon*" inquiry, which would have asked whether any juror would automatically vote to impose the death penalty regardless of the facts. Because the trial judge asked questions concerning the jurors fairness and impartiality during *voir dire*, the court found that the *voir dire* was of the same general nature as the "reverse-*Witherspoon*" inquiry. *Morgan*, 112 S. Ct. at 2226.

The Illinois Supreme Court affirmed and held that the "reverse-*Witherspoon*" inquiry was not constitutionally required. It also found the *Morgan* jury fair and impartial because each juror had sworn to uphold the law and none expressed partial views. The United States Supreme Court granted certiorari to decide whether, during *voir dire* for a capital offense, the Due Process Clause of the Fourteenth Amendment requires a trial court to refuse to ask whether a potential juror would automatically impose the death penalty upon conviction.

The Court first confirmed the impartiality requirement imposed upon a jury during the sentencing phase of a capital offense case. *Id.* at 2228. The Court invoked its decision in *Turner v. Louisiana*, 379 U.S. 466 (1965), in which the Supreme Court held that the Fourteenth Amendment's Due Process Clause required impartiality to the same extent required under the Sixth Amendment of any jury empaneled to decide a case. *Morgan*, 112 S. Ct. at 2229.

Next, the Court determined, in accordance with the holding in *Wainwright v. Witt*, 469 U.S. 412 (1985), that when a juror's views on capital punishment would impair the performance of her duty to follow instructions, such a juror is not impartial and must be removed for cause. *Morgan*, 112 S. Ct. at 2229. In support of its conclusion, the Court cited its decision in *Ross v. Oklahoma*, 487 U.S. 81 (1988), in which a juror who would have automatically voted for the death penalty was removed by preemptory challenge. The Court determined that the failure to remove the juror for cause was error under the standard set forth in *Witt*. *Morgan*, 112 S. Ct. at 2229.

The Court next addressed whether a trial court must inquire into a juror's views on capital punishment upon a defendant's request. *Voir dire*, the Court stated, is a critical method of effectuating the criminal defendant's right to an impartial jury. *Id.* at 2230. Only with the proper *voir dire* can a trial judge fulfill the responsibility of

identifying and removing jurors who would "not be able impartially to follow the court's instructions and evaluate the evidence." *Id.* (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981)). The Court, therefore, reiterated that because there was a right to challenge a juror based on bias, then there remained the right to propose questions designed to uncover bias. The trial judge would thereafter be responsible for determining if the challenge was proper. *Morgan*, 112 S. Ct. at 2232.

Finally, the Court addressed the remaining issue of whether questions propounded by the trial court were sufficient to satisfy the petitioner's right to due process. *Id.* The Court determined that jurors who would "unalterably" either oppose or propose the death penalty in every case were incapable of following the law in the performance of their duties. *Id.* at 2233. The Court, therefore, concluded that a trial court's general questions concerning fairness and impartiality would be insufficient to identify jurors with biased views about the death penalty. It would be possible, the Court added, for jurors to intend to uphold the law, but be unaware that dogmatic beliefs about the death penalty would prevent them from doing so. *Id.* The petitioner was thus entitled to ask specific questions which would identify jurors with predetermined opinions about whether or not to impose the death penalty regardless of the facts of the case. *Id.* at 2233.

The Supreme Court in *Morgan v. Illinois* established that the Due Process Clause of the Fourteenth Amendment enables a capital defendant to challenge and remove for cause jurors whose views on capital punishment would lead them to automatically vote for the death penalty upon conviction. The decision is a significant victory for capital defendants and their attorneys because it aids their ability to ferret out jurors who hold unreasonable convictions concerning capital punishment. Because most people perceive themselves as fair, general questions con-

cerning an individual's ability to judge fairly are insufficient inquiry for the purposes of identifying partiality among jurors. Furthermore, the inclusion of capital defendants among those possessed with the ability to impose a *Witherspoon* inquiry balances the scales between the State's and the defendant's ability to successfully challenge jurors and remove them for cause.

- Kim Germaine Judd

New York v. United States: TAKE TITLE PROVISION OF LOW-LEVEL RADIOACTIVE WASTE POLICY AMENDMENT ACT HELD UNCONSTITUTIONAL.

In *New York v. United States*, 112 S. Ct. 2408 (1992), the Supreme Court of the United States held that the "take title" provision of the Low-Level Radioactive Waste Policy Amendment Act of 1985 violated the Tenth Amendment of the United States Constitution. In reaching its conclusion, the Court resolved a constitutional issue of the proper division of authority between the Federal Government and the States. The Court decided that although Congress may encourage a state to provide for the disposal of low level radioactive waste generated within its borders, it may not compel a state to do so.

At the end of the 1970's, Congress faced an environmental crisis in the disposal of low level radioactive waste. This type of waste, generated from sources as disparate as smoke alarms and medical fluids, must be isolated from humans for up to hundreds of years. Despite a crucial need for repositories of such waste, the number of disposal sites had dwindled. By 1979, the only operating disposal site in the country was in South Carolina. Therefore, that state alone bore the burden of storing low level radioactive waste produced throughout the nation. To avert disaster, Congress responded by enacting the Low-Level Radioactive Waste Policy Act of 1980 ("1980 Act"). The 1980 Act held each State responsible for the disposal of waste

that it generated. A State could dispose of its waste at a disposal facility located either within its borders or in another State with which it had reached a regional compact agreement. Because the 1980 Act carried no penalty for non-compliance, by 1985 thirty-one states had not joined a regional compact and were due to be excluded, leaving them no assured outlet for their low level radioactive waste.

Faced with this prospect, Congress passed the Low-Level Waste Policy Amendments Act of 1985 ("1985 Act"). Three incentives were created to encourage states to provide for disposal of waste generated within their borders. First, monetary incentives in the form of payments from a designated escrow account would be made to States that complied with the statute's deadlines. Second, the deadlines were linked to access to the sites; thus, States that did not comply would be assessed progressively higher surcharges and eventually denied access completely. The third provision required that each State which failed to comply with the established deadline take title to the waste generated within its borders and be held liable for all damages incurred as a consequence of the State's failure to take possession.

The State of New York chose to conform to the Act's requirements by passing legislation to provide for the siting and financing of a disposal facility in its state. The State of New York and residents of two of the counties in which sites had been proposed filed suit against the United States in the United States District Court for the Northern District of New York seeking a declaratory judgment that the 1985 Act was unconstitutional. They acknowledged that Congress could regulate interstate commerce in waste material under the Commerce Clause and that Congress could use the Supremacy Clause to pre-empt state regulation of radioactive waste. They claimed, however, that by directing the states to regulate in this field, Congress violated the Tenth Amendment. Nevada,