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Christopher Letkewicz

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STACKING THE DECK IN FAVOR OF DEATH: THE ILLINOIS SUPREME COURT'S MISINTERPRETATION OF MORGAN V. ILLINOIS

CHRISTOPHER LETKEWICZ*

I. INTRODUCTION

Illinois’s death penalty statute provides in part that “[i]f there is a unanimous finding by the jury that one or more of the [aggravating] factors set forth . . . exist[s], the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed.”1 It seems to follow, then, that if a particular statutory aggravating factor is present, the statute’s requirement for jurors to consider both aggravating and mitigating factors allows defendants the opportunity to question potential jurors in voir dire on whether they would automatically vote for death based on that particular factor.

However, the Illinois Supreme Court held in People v. Hope that in accordance with the U.S. Supreme Court decision in Morgan v. Illinois,2 a defendant is only constitutionally entitled to ask potential jurors “whether they would automatically vote to impose the death penalty upon a finding of guilt,” and not

* J.D. Candidate at the DePaul University College of Law, May 2009; B.A. 2004, University of Notre Dame. I would like to thank Marc Stahl, Assistant Public Defender at the Law Office of the Cook County Public Defender, who gave helpful feedback on an earlier draft of this Article. I would also like to thank my parents, Lawrence and Julie Letkewicz, for all their love and support.
1 720 ILL. COMP. STAT. 5/9-1(g) (2007).
2 504 U.S. 719, 729.

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whether potential jurors would automatically vote for the death penalty if a particular statutory aggravating factor was present. The holding in *Hope* was subsequently reaffirmed in *People v. Brown*, *People v. Jackson*, *People v. Buss*, and *People v. Harris*. This Article will argue that the Illinois Supreme Court’s holding in *Hope* and its progeny should be overruled and that a defendant is constitutionally entitled to question potential jurors in jury selection about statutory aggravating factors. In support of this thesis, Part II explores the history of the U.S. Supreme Court’s voir dire jurisprudence in death penalty cases, examining the cases that led up to *Morgan*. Part II also examines how Illinois and other states have interpreted *Morgan*. Part III demonstrates that the Illinois Supreme Court has interpreted *Morgan* too narrowly. Part IV discusses the implications of requiring trial courts to permit defendants’ voir dire questioning of prospective jurors about statutory aggravating factors and discusses some typical questioning that a trial judge should permit.

II. BACKGROUND

In order to understand the reasoning of *People v. Hope*, it is necessary to first examine the U.S. Supreme Court’s voir dire jurisprudence in death penalty cases leading up to the *Morgan v. Illinois* decision. After examining the U.S. Supreme Court’s jurisprudence, this Part examines *Hope* and its progeny in Illinois. Finally, this Part concludes by examining the reasoning other state supreme courts have used to establish either a narrow or broad view of *Morgan*.

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3 People v. Hope, 658 N.E.2d 391, 403-04 (Ill. 1995).
6 718 N.E.2d 1, 24 (Ill. 1999).
7 866 N.E.2d 162, 185 (Ill. 2007).
8 658 N.E.2d at 403-04.
A. U.S. Supreme Court Jurisprudence

The Supreme Court first substantively dealt with the issue of dismissing jurors in voir dire who express a reluctance to impose the death penalty in Witherspoon v. Illinois.9 Witherspoon involved an Illinois statute that allowed a prosecutor to dismiss potential jurors for cause in voir dire when the jurors indicated they had “conscientious scruples against capital punishment.”10 The Court held that jurors could not be dismissed “for cause simply because they voiced general objections to the penalty or expressed conscientious or religious scruples against its infliction” without violating the defendant’s right to an impartial jury under the Sixth and Fourteenth Amendment.11 The Court clarified, however, that its decision did not reach the issue of the prosecutor’s ability to dismiss a juror for cause who would always vote against imposing the death penalty or could not be impartial in the guilt or innocence phase because of his views of the death penalty.12

Ten years later, the Court in Lockett v. Ohio upheld the dismissal of four prospective jurors who stated that they were so against the death penalty that they could not take an oath to follow the law.13 The Court reasoned that these prospective jurors “made it ‘unmistakably clear’ that they could not be trusted to ‘abide by existing law’ and ‘to follow conscientiously the instructions’ of the trial judge.”14

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10 Id. at 512 (quoting ILL. REV. STAT. ch. 38, § 743 (1959)).
11 Id. at 518, 522.
12 Id. at 522 n.21.
14 Id. at 596 (quoting Boulden v. Holman, 394 U.S. 478, 484 (1969)). The Court in Boulden remanded the petitioner’s habeas corpus proceeding to the district court to determine whether the petitioner’s death sentence was unconstitutional in light of Witherspoon because several potential jurors in the petitioner’s death penalty case were dismissed for cause for merely expressing an opinion against the death penalty. 394 U.S. at 482–85.
In 1980, the Court concluded in *Adams v. Texas* that *Witherspoon* and its progeny established that a juror’s views on capital punishment warrants a dismissal for cause when those views either “would prevent or substantially impair” the juror’s performance of his duties. The Court reaffirmed this standard in *Wainwright v. Witt* and made clear that a defendant’s right to an impartial jury under the Sixth Amendment requires jurors “who will conscientiously apply the law and find the facts.”

The Court further emphasized the importance of jurors’ willingness to follow the law in *Ross v. Oklahoma*. In *Ross*, a juror stated during voir dire that he would automatically vote for the death penalty if he found the petitioner guilty, and the petitioner’s attorney was forced to use a preemptory challenge to dismiss him when the trial court refused to remove him for cause. The Court noted, in dicta, that if the petitioner had “preserved his right to challenge the trial court’s failure to remove [the juror] for cause,” and had the juror sat on the jury that found the petitioner guilty and sentenced the petitioner to death, a reversal of the sentence would have been required under the *Adams/Witt* dismissal standard.

While the Court’s discussion in *Ross* regarding the juror who stated that he would automatically vote for the death penalty upon a finding of guilt was merely dicta, the Court explicitly held in *Morgan v. Illinois* that in accordance with the Fourteenth Amendment, a defendant must be permitted to ask potential jurors whether they would automatically impose the death penalty.

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18 *Id.* at 83-84.
19 *Id.* at 85. The Court ultimately upheld the petitioner’s death sentence because the petitioner failed to show “that the jury was not impartial,” or that the trial court violated state law with regard to a defendant’s use of preemptory challenges. *Id.* at 86, 90-91.
upon a finding of guilt.\textsuperscript{20} The Court reasoned that a juror who would automatically vote for the death penalty upon a finding of guilt would fail to consider aggravating and mitigating circumstances, and therefore be unable to follow either jury instructions or the law.\textsuperscript{21} While the Court noted that the Constitution "does not dictate a catechism for voir dire," it made clear that defendants must be allowed adequate voir dire to determine if a potential juror can follow the law.\textsuperscript{22}

\textbf{B. Illinois Supreme Court's Interpretation of Morgan}

A jury has potentially three tasks in a capital case in Illinois. First, the jury must determine the defendant's guilt or innocence. Second, if the jury finds the defendant guilty, then the jury must determine, at a separate sentencing proceeding, if the defendant satisfies any of the aggravating factors set forth in the Illinois Compiled Statutes.\textsuperscript{23} Third, if the jury determines that the defendant satisfies one of the statutory aggravating factors, and is therefore eligible to receive the death penalty, the jury must then weigh the aggravating and mitigating factors in the case to determine if the defendant warrants the death penalty.\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{20} 504 U.S. 719, 729 (1992). Specifically, the Court held that it was impermissible for the trial court to prohibit the defendant from asking the following question: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" \textit{Id.} at 723.
\item \textsuperscript{21} \textit{Id.} at 729. The statute in question required the jury to "consider aggravating and mitigating factors as instructed by the court and \[the jury\] shall determine whether the sentence of death shall be imposed. If the jury determines that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death." \textit{Id. at 737 n.10 (quoting ILL. REV. STAT., ch. 38, § 9-1(g) (Supp. 1990)).}
\item \textsuperscript{22} \textit{Id.} at 729, 735–36.
\item \textsuperscript{23} 720 ILL. COMP. STAT. 5/9-1(g); \textit{see also} Illinois Pattern Jury Instructions, Criminal, No. 7B.01.
\item \textsuperscript{24} 5/9-1(g). The text of act 5, article 9-1(g) has not significantly changed from when the U.S. Supreme Court considered \textit{Morgan v. Illinois}. \textit{See} 504 U.S. 719, 737 n.10 (1992). It should be noted that the trial court is "bound by the jury's sentencing determination" even if it does not agree with the jury's sentencing determination. 5/9-1(g). However, if the trial court does not
\end{itemize}
In *People v. Hope*, the Illinois Supreme Court was faced with the question of whether the voir dire in a defendant’s death penalty case was sufficient to find those jurors who could consider both aggravating and mitigating factors. The defendant in *Hope* was allowed to ask potential jurors if “they would automatically vote for death if the defendant was found guilty,” but was prohibited from asking if they would automatically vote for death “if they should be told that [the defendant] was eligible for death because he has been convicted of another murder.”

The court held that the voir dire was sufficient to root out those jurors who were so biased that they could not follow the law as instructed. The court reasoned that *Morgan* “specifically directed its holding toward the end of discovering jurors for whom ‘the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant.’” Therefore, the additional questioning that the defendant sought fell outside of the scope of *Morgan*, and the trial court acted within its discretion in denying such questioning.

Less than a year after its decision in *Hope*, the Illinois Supreme Court in *People v. Brown* was again faced with the question of whether a trial court could prohibit defendants from asking about specific statutory aggravating factors in voir dire.

agree with the jury’s sentencing determination, it has to set forth, in writing, the reasons why it disagrees with the jury. *Id.*


26 *Id.* at 403. The defendant in *Hope* was convicted in an earlier proceeding of murdering a police officer. *Id.* at 397. Thus, two murder convictions would make the defendant death eligible. See 720 ILL. COMP. STAT. ANN. 5/9-1(b)(3) (West 1993).

27 *Hope*, 658 N.E.2d at 404.

28 *Id.* at 403–04 (quoting *Morgan v. Illinois*, 504 U.S 719, 729 (1992)).

29 *Id.* at 404.

30 665 N.E.2d 1290 (Ill. 1996). The defendant in this case sought to ask potential jurors whether they would automatically vote for the death penalty if they found that the defendant committed multiple murders and murdered a two-year-old and a three-year-old child. *Id.* at 1303; see 720 ILL. COMP. STAT.
The court again found that a trial court is not required to allow such voir dire questioning under *Morgan*. Along with relying on the reasoning of the *Hope* court, the *Brown* court reasoned that the trial court's questioning of potential jurors on whether they would automatically vote for the death penalty upon a finding of guilt was designed to gauge a potential juror's death penalty views and did not involve "generalized questions of fairness and impartiality." Thus, the voir dire in *Brown* was constitutionally sufficient.

Despite the court's holdings in *Hope* and *Brown*, defendants continued to challenge the inability to question potential jurors about statutory aggravating factors in voir dire. In *People v. Jackson*, *People v. Buss*, and *People v. Harris*, the defendants sought to ask jurors in voir dire whether they would automatically vote for the death penalty if certain statutory aggravating factors were present. Each time, the Illinois Supreme Court—relying on its precedent—upheld the trial courts' decisions to bar such questioning.

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*Ann. 5/9-1(b)(3) (West 1996) (multiple murders); see also 720 Ill. Comp. Stat. Ann. 5/9-1(b)(7) (West 1996) ("[M]urdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty").

31 665 N.E.2d at 1304.
32 Id. at 1303–04.
33 Id. at 1304.
34 695 N.E.2d 391, 407 (Ill. 1998) (finding no error in the trial court's refusal to ask prospective jurors whether they would automatically vote for death in cases involving the murder of a child or where the defendant had committed multiple murders).
35 718 N.E.2d 1, 23–24 (Ill. 1999) (holding that the trial court did not err in refusing to ask jurors in voir dire whether they would automatically vote for death in cases involving the murder of a child).
36 866 N.E.2d 162, 184–85 (Ill. 2007) (concluding that the trial court did not err in refusing to ask potential jurors whether they would automatically vote for death "if the 'defendant were found guilty of two murders'").
37 866 N.E.2d at 184; 718 N.E.2d at 22–23; 695 N.E.2d at 407.
38 866 N.E.2d at 185; 718 N.E.2d at 23–24; 695 N.E.2d at 407.
C. Other States’ Interpretation of Morgan

Several other state supreme courts, such as the Arizona Supreme Court, the North Carolina Supreme Court, and the Mississippi Supreme Court, have embraced Illinois’s narrow view of Morgan and have held that defendants are not constitutionally entitled to question potential jurors about whether they would automatically vote for the death penalty upon a finding of guilt if a particular aggravating factor is present. The primary reasoning that those state supreme courts have relied on to justify their holdings is that such questioning constitutes improper “stake-out” questioning. In other words, such questioning improperly seeks to have jurors precommit to a sentencing determination. Consequently, Morgan has been limited and its requirements are satisfied once prospective jurors are questioned about whether they would automatically vote for death upon a finding of guilt.

39 E.g., State v. Smith, 159 P.3d 531, 541 (Ariz. 2007) (wanting to question jurors in voir dire if they would automatically vote for death “if they found specific aggravators”); Evans v. State, 725 So. 2d 613, 651 (Miss. 1997) (seeking to question potential jurors whether they “would vote for the death penalty when a person, previously convicted of [a] felony, is convicted of capital murder with an underlying felony of kidnapping or sexual battery”); State v. Robinson, 451 S.E.2d 196, 202 (N.C. 1994) (seeking to question prospective jurors whether they would follow the law and consider both aggravating and mitigating factors where the defendant had been convicted of murder on multiple occasions).

40 E.g., Smith, 159 P.3d at 541 (reasoning that “Morgan was not meant to allow a defendant to ‘ask a juror to speculate or precommit on how that juror might vote based on any particular facts’” (quoting United States v. McVeigh, 153 F.3d 1166, 1207 (10th Cir. 1998))); Evans, 725 So. 2d at 651 (concluding that the disallowed voir dire questioning sought to “inquire as to the juror’s conclusions or the verdict they would reach”); Robinson, 451 S.E.2d at 202 (determining that the defendant’s voir dire questions were an “improper attempt to ‘stake out’ the jurors as to their answers to legal questions before they are informed of legal principles applicable to their sentencing recommendation”).

41 See, e.g., 725 So. 2d at 651.

42 See, e.g., 159 P.3d at 540–41; Crawford v. State, 716 So. 2d 1028, 1042–43 (Miss. 1998); State v. Fletcher, 500 S.E.2d 668, 679 (N.C. 1998).
While some state supreme courts have adopted Illinois's narrow view of *Morgan*, other state supreme courts, such as the California Supreme Court and the Louisiana Supreme Court, have adopted a less restrictive view of *Morgan*. For example, the California Supreme Court in *People v. Cash*, relying in part on *Morgan*, reversed a defendant's death sentence when the trial court refused to permit the defendant to question potential jurors about whether they would automatically vote for the death penalty if they found that the defendant killed more than one person. The court reasoned that the trial court's limitation in voir dire created the possibility that a juror was empanelled on the defendant's jury who automatically voted for the death penalty because of these multiple murders, and therefore, the defendant's constitutional right to an impartial jury was violated.

Similarly, the Louisiana Supreme Court held in *State v. Robertson* and *State v. Maxie* that the trial courts committed re-

43 50 P.3d 332, 340, 343 (Cal. 2002). The trial court in *Cash* denied the defendant's voir dire inquiry, because the multiple murders for which the defendant had been earlier convicted were not in the State's charging documents. *Id.* at 340. Commission of multiple murders was considered a "special circumstance" under California law, making the defendant death-eligible. *Cal. Penal Code* § 190.2(a)(2) (West 2001).

44 50 P.3d at 341-43. Along with relying on *Morgan* to reach its decision, the court also relied in part on an earlier decision, *People v. Kirkpatrick*, in which the court announced the following view:

A 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 aggravating and mitigating circumstances, is therefore subject to challenge for cause, whether or not the circumstance that would be determinative for that juror has been alleged in the charging document.

50 P.3d at 341-43; 874 P.2d 248, 257 (Cal. 1994). This view of the *Kirkpatrick* court appears to have been based not on the *Morgan* decision, but rather on the *Adams/Witt* dismissal standard, as the court cited that standard before announcing its view. 874 P.2d at 257 (citing Wainwright v. Witt, 469 U.S. 412, 424 (1985)).

45 *State v. Robertson*, 630 So. 2d 1278 (La. 1994).

46 653 So. 2d 526 (La. 1995).
versible error when they refused to dismiss jurors for cause who stated in voir dire that they would automatically vote for the death penalty based on the factual circumstances of the cases. The court reasoned in both cases that the jurors at issue could not be impartial and follow the law. In other words, the jurors at issue had “views on capital punishment in the particular case [that] prevented or substantially impaired them from following” Louisiana law to consider both aggravating and mitigating circumstances before making a capital sentencing decision.

In sum, both the California and the Louisiana Supreme Courts have adopted the view that a juror cannot be impartial if he or she would automatically vote for the death penalty upon a finding of guilt if a particular aggravating factor is present.

III. Analysis

For the following three reasons, an Illinois defendant should be permitted to ask jurors in voir dire whether they would automatically vote for the death penalty upon a finding of guilt if a

47 653 So. 2d at 535–38 (juror repeatedly stated that she would automatically vote for the death penalty if the defendant was “convicted of first degree rape murder”); 630 So. 2d at 1282–83 (juror stated multiple times in voir dire that he would automatically vote for the death penalty if the defendant was convicted of two counts of first degree murder).
48 653 So. 2d at 537–38; 630 So. 2d at 1283. While neither Maxie or Robertson explicitly relied on Morgan in its decision, it is clear in the Louisiana Supreme Court’s later decisions that the court in Robertson at least implicitly relied on Morgan. See State v. Divers, 681 So. 2d 320, 324 n.5 (La. 1996). The court in State v. Divers noted that its decision in Robertson showed that jurors who will “automatically vote for the death penalty under the factual circumstances of the case before him” is “substantially impair[ed]” under the Witt standard and that the “Morgan Court adopted the Witt standard for determining if a pro-death juror should be excused for cause.” See id. (quoting Robertson, 630 So. 2d at 1284 (La. 1994)).
49 State v. Miller, 776 So. 2d 396, 404 (La. 2000).
50 E.g., People v. Cash, 50 P.3d 332, 342–43 (Cal. 2002); Robertson, 630 So. 2d at 1283. Unlike the California Supreme Court in Cash, the Louisiana Supreme Court has never explicitly recognized that a defendant has a constitutional right to question jurors about aggravating factors.
particular statutory aggravating factor is present. First, such questioning is required to protect a defendant's constitutional right to an impartial jury. Second, the defendant's constitutional right to an impartial sentencing jury outweighs the trial court's interest to conduct voir dire as it sees fit. Third, questions in voir dire concerning statutory aggravating factors are not impermissible "stake out" questions that would require jurors to precommit to a sentencing determination.

A. Defendant's Constitutional Right to an Impartial Jury

The Illinois Supreme Court has adhered to the belief that Morgan only requires a trial court to permit questioning that will root out jurors who believe that aggravating and mitigating evidence is irrelevant. Consequently, the trial court can prohibit questioning that attempts to root out jurors who believe, in certain cases, that aggravating evidence is relevant and mitigating evidence is irrelevant, and vice versa. However, such a view is problematic because the Illinois death penalty statute requires jurors to consider both aggravating and mitigating factors after determining that the defendant is death eligible. And to consider means "to think about with a degree of care or caution" or "treat in an attentive, solicitous, or kindly way." Thus, under the plain meaning of the Illinois death penalty statute, jurors who find either aggravating or mitigating evidence to be irrelevant are unable to follow the requirements of Illinois law to consider both aggravating and mitigating factors. Regardless of the type of capital case at issue, such as multiple murders

52 See id.
55 Id. See 5/9-1(g); see also Susan D. Rozelle, The Utility of Witt: Understanding the Language of Death Qualification, 54 BAYLOR L. REV. 677, 687 (2002) (discussing the meaning of "consider"); The Harvard Law Review Associa-

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or murder of a police officer, the Illinois death penalty statute makes no exceptions to its requirement that jurors consider both aggravating and mitigating evidence.\(^{56}\) Consequently, jurors who, for example, consider mitigating evidence to be irrelevant in multiple murder capital cases are just as unable to follow the plain meaning of the Illinois death penalty statute as jurors who consider mitigating evidence to be irrelevant in all capital cases.\(^{57}\) Indeed, both the U.S. Supreme Court and the Illinois Supreme Court have concluded that a death penalty system that would automatically sentence a defendant to death based on a particular aggravating factor is unconstitutional.\(^{58}\)

The Morgan court recognized the importance of having jurors who carefully think about aggravating and mitigating evidence.\(^{59}\) The Court noted that due process under the Fourteenth Amendment requires jurors to consider the evidence of both aggravating and mitigating factors, Defendant's Right to Strike Automatic Death Penalty Jurors, 106 Harv. L. Rev. 183, 190 (1992) (discussing the definition of "consider").

\(^{56}\) See id.\(^{57}\) See also Brief & Argument for Defendant-Appellant at 59–60, People v. Harris, 866 N.E.2d 162 (Ill. 2007) (No. 98942) [hereinafter Brief for Defendant-Appellant Harris] ("[T]hose who will impose death in every case are merely one type of individual who will not consider mitigation."); Reply Brief & Argument for Defendant-Appellant at 8, People v. Hope, 658 N.E.2d 391 (Ill. 1995) (No. 75503) [hereinafter Reply Brief for Defendant-Appellant Hope] ("The juror who would automatically vote for death upon a finding of [death] eligibility would not consider and weigh mitigating evidence. The danger is exactly the same as the automatic vote for death upon a conviction.").

\(^{58}\) Sumner v. Shuman, 483 U.S. 66, 67, 68 n.1, 85 (1987) (striking down a state's death penalty statute that mandated that a defendant be sentenced to death if he commits a murder while serving a life sentence without the opportunity for parole); Roberts v. Louisiana, 428 U.S. 325, 329, 330 n.3, 336 (1976) (holding that the state's death penalty statute that required a defendant to be sentenced to death if he committed a murder that had a particular aggravating factor such as the murder of a police officer as being a violation of the Eighth and Fourteenth Amendments); People v. Young, 538 N.E.2d 461, 480 (Ill. 1989) (rejecting a defendant's argument that the Illinois death penalty statute should be amended as to require that a defendant be sentenced to death if the defendant satisfies one of the aggravating factors).

ing and mitigating factors in good faith. Additionally, the Court noted that jurors who found mitigating evidence to be immaterial should be dismissed for cause. While the Court was dealing with the question of whether the defendant could ask jurors if they would automatically vote for death upon a finding of guilt, the crux of the Court’s reasoning was that jurors must be willing to consider mitigating evidence regardless of what the aggravating factors may be. Indeed, the “thrust of Morgan is to identify those jurors who, because of personal convictions or preconceived notions about the seriousness of certain types of crimes, will not consider mitigating evidence no matter what the evidence might be.”

The dissent in Morgan interpreted the majority’s opinion as holding that jurors who would automatically vote for death if certain aggravating factors were present should be dismissed for cause. The dissent argued that jurors who would state in voir dire that they would always convict a defendant if the state

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60 Id.
61 Morgan, 504 U.S. at 739.
62 See Brief for Defendant-Appellant Harris, supra note 58, at 59–60; Reply Brief for Defendant-Appellant Anton Brown Challenging His Conviction & Sentence of Death at 8, People v. Brown, 665 N.E.2d 1290 (Ill. 1996) (No. 74532) [hereinafter Reply Brief for Defendant-Appellant Brown]. This broad reading of Morgan is supported by Wainwright v. Witt. 469 U.S. 412 (1985). In Witt, the Court rejected the argument that because the prosecutor in the case used the word “interfere” instead of “prevent,” as was set forth in the jury dismissal standard in Adams v. Texas in questioning a juror, the trial court did not have a basis for dismissing the juror for cause. 469 U.S. at 432–34. The Court reasoned that “[r]elevant voir dire questions addressed to this issue need not be framed exclusively in the language of the controlling appellate opinion; the opinion is, after all, an opinion and not an intricate device in a will.” Id. at 433–34.
63 Reply Brief for Defendant-Appellant Brown, supra note 63, at 8. But see 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, 19 Miss. C. L. REV. 283, 300 (1999) (arguing that death penalty voir dire questioning should be limited to whether jurors can consider the death penalty in the abstract and not whether they can consider the death penalty based on the facts and circumstances of the case).
proved the “elements of circumstantial evidence x, y, and z” would be a lawful juror who should not be dismissed for cause.64

In sum, the majority in *Morgan* believed that a jury could not fulfill its constitutional mandate to be impartial and follow the law if the jurors would refuse to give mitigating evidence any weight.65

The Louisiana Supreme Court recognized this constitutional mandate for impartial jurors in *State v. Robertson*66 and *State v. Maxie*.67 In both cases, the Louisiana Supreme Court made clear that jurors who would refuse to give mitigating evidence any weight because of the aggravating factors or circumstances involved in the case are unable be impartial and follow the law.68 Thus, such jurors must be dismissed for cause.69 The fact that jurors might consider non-death sentences in other capital cases is irrelevant, because the jurors refuse to consider a non-death sentence in the case before them.70

The California Supreme Court also recognized this constitutional mandate.71 It held that jurors’ constitutional duty is to make a sentencing determination based on “the strength of aggravating and mitigating circumstances” and not an automatic determination—whether it be for or against the death penalty—based on a particular circumstance.72 An essential way to determine if jurors will fulfill this constitutional duty is to be able to question them in voir dire regarding whether they would automatically vote for the death penalty if a particular aggravating

64 *Morgan*, 504 U.S. at 741 (Scalia, J., dissenting).
66 *State v. Robertson*, 630 So. 2d 1278 (La. 1994).
67 653 So. 2d 526 (La. 1995).
68 653 So. 2d at 538; Robertson, 630 So. 2d at 1283.
69 See, e.g., 630 So. 2d at 1283.
70 *Id.*
72 874 P.2d at 257.
factor is present. To not allow such questioning would violate a “defendant’s due process rights to an impartial jury.”

It is important to understand the consequences of not allowing the questioning of jurors in voir dire about particular aggravating factors. The Capital Jury Project’s (CJP) research is instructive as to these consequences. In its survey of jurors who served on capital cases, it found that over 70% of those jurors believed that the death penalty was the only appropriate sentence for a case involving “murder by someone previously convicted of murder.” Fifty-seven percent of those jurors believed that the death penalty was the only appropriate sentence for a case involving “a planned, premeditated murder.” Fifty-two percent of those jurors believed that the death penalty was the only appropriate punishment for a case involving “murders in which more than one victim is killed.” Almost 48% of those jurors believed that the death penalty was the only appropriate punishment for a case involving the “killing of a police officer or

73 50 P.3d at 341.
74 Id. at 342-43.
75 The Capital Jury Project (CJP) is a large research project dedicated to studying capital jury decision-making in fifteen different states (Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas and Virginia). William J. Bowers et al., Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making, 83 CORNELL L. REV. 1476, 1486, 1488, 1488 tbl.1 (1998) [hereinafter Bowers Foreclosed Impartiality]; William J. Bowers, The Capital Jury Project: Rationale, Design, and Preview of Early Findings, 70 IND. L.J. 1043, 1078 n.190, n.192, n.194 (1995) [hereinafter Bowers Early Findings]. The CJP selected twenty to thirty capital juries in each of the fifteen states and then selected four jurors from each of those juries for three to four hour personal interviews. Bowers Foreclosed Impartiality, supra, at 1486–87. The CJP questioned the jurors about various aspects of their sentencing decision-making process. Id. at 1486.
76 Id. at 1504, 1505 tbl.6. CJP surveyed 892 jurors from eleven of the fifteen states that were a part of its research project. Id. at 1487, 1505 tbl.6. Indiana, Louisiana, New Jersey and Tennessee were excluded. Id. at 1487 n.44.
77 Id. at 1505 tbl.6. CJP surveyed 888 jurors on this question. Id.
78 Id. CJP surveyed 892 jurors on this question. Id.
prison guard. Finally, over 45% of those jurors believed that the death penalty was the only appropriate punishment in a case involving a “murder by a drug dealer.”

It is important to note that these percentages are of jurors who actually served on a capital jury. Presumably, these jurors were at least questioned in the abstract about whether they would consider aggravating and mitigating evidence and whether they would follow the law. Despite these questions, all of these jurors were viewed as impartial and allowed to serve on a capital jury. If these jurors had served on a capital case in Illinois, involving one of the factual scenarios discussed above, the defendant would be faced with a jury in which at least half of the jury would have already decided to vote for the death penalty, regardless of what mitigating evidence the defendant might bring forth. Yet such a jury would be deemed impartial so long as the defendant could ask jurors in voir dire whether they would automatically vote for the death penalty upon a finding of guilt. How the Illinois Supreme Court could deem such a jury impartial is quite perplexing.

79 Id. CJP surveyed 888 jurors on this question. Id.
80 Id. CJP surveyed 890 jurors on this question. Id. CJP also found that over 21% of 883 jurors surveyed believed that death was the only appropriate sentence where an “outsider to the community kills an admired and respected member of the community,” and over 23% of 891 jurors surveyed believed that death was the only appropriate sentence in a case involving a “killing that occurs during another crime.” Id.
81 Bowers Foreclosed Impartiality, supra note 76, at 1486–87.
82 Id.
84 See Bowers Foreclosed Impartiality, supra note 75, at 1505 tbl.6. Particularly troubling are the CJP findings that the more scenarios for which jurors believe that the death penalty is the only appropriate punishment, the more likely that jurors will find that the death penalty is appropriate in the case before them during the guilt phase of the trial rather than the sentencing phase. Id. at 1507 tbl.7.
86 See Blume et al., supra note 66, at 1258 (arguing that an impartial jury can only be achieved through probative voir dire questioning extending beyond...
One argument that could be made in response to these shocking numbers is that having some jurors who would automatically vote for the death penalty based on the statutory aggravating factors in the case would not deny the defendant an impartial jury because other jurors could potentially block imposing the death penalty, as the Illinois statute requires a unanimous jury vote for the death penalty before it can be imposed. However, such reasoning should be rejected for two reasons. First, research on capital juries has shown that whether a jury votes for death often comes down to a few votes. In the CJP's survey of capital juries in South Carolina, researchers found that when nine or more jurors voted for death in the first vote during sentencing deliberations, the jury returned a death sentence 100% of the time. But when seven or fewer jurors voted for death on the first vote, none of the juries returned a death sentence. Thus, if a defendant is charged with a murder involving one of the five factual scenarios discussed above, the prosecutor realistically only needs to convince three or fewer jurors to get a death sentence because at least half of the jurors will already

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88 Theodore Eisenberg et al., Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty, 30 J. LEGAL STUD. 277, 303-04 (2001).
89 Id. at 303 tbl.7, 304. The CJP's survey sample of capital jurors consisted of 187 jurors who sat in on one of 53 randomly selected capital trials. Id. at 280-81. Twenty-eight of those cases resulted in death sentences and twenty-five resulted in life sentences. Id. at 280. While the sample was limited to capital jurors in South Carolina, the CJP found no significant difference between South Carolina jurors and jurors in other jurisdictions in its data. Id. at 280, 280 n.10 (citing Theodore Eisenberg et al., Jury Responsibility in Capital Sentencing: An Empirical Study, 44 BUFF. L. REV. 339, 354 (1996); Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 COLUM. L. REV. 1538, 1575-76 (1998)).
90 Eisenberg et al., supra note 88, at 303 tbl.7, 304.
vote for the death penalty automatically. Consequently, allowing jurors who would automatically vote for the death penalty if certain statutory aggravating factors are present makes it significantly easier for prosecutors to secure death sentences.

Second, the U.S. Supreme Court has rejected the argument that a jury is still impartial even though one juror in that jury is not impartial. The Court stated in Morgan that if one juror is empaneled who would automatically vote for death upon a finding of guilt, and the defendant is sentenced to death, the sentence violates the Sixth Amendment and Fourteenth Amendment. In other words, if one juror is unable to be impartial within the meaning of the Sixth and Fourteenth Amendments, then the whole jury cannot be considered impartial.

In sum, Morgan requires a trial judge to permit questioning about statutory aggravating factors to protect a defendant’s constitutional right to an impartial jury. The CJP’s survey of capital jurors makes clear that to disallow such questioning creates the very real possibility of a defendant having jurors on his jury who will automatically vote for the death penalty because of the statutory aggravating factors involved in the case.

B. Defendant's Constitutional Right to an Impartial Sentencing Jury v. Trial Court's Right to Conduct Voir Dire as It Sees Fit

One of the primary reasons the Illinois Supreme Court has been hesitant to require trial courts to allow questioning of jurors regarding statutory aggravating factors is that a trial court

91 See id. at 303 tbl.7; Bowers Foreclosed Impartiality, supra note 75, at 1505 tbl.6. This is assuming that Illinois jurors feel as strongly about these different scenarios as jurors who participated in the CJP.
93 Id.
94 Id.
95 See Blume et al., supra note 65, at 1258.
96 See Bowers Foreclosed Impartiality, supra note 75, at 1505 tbl.6.
has discretion in the “conduct and scope of jury voir dire.” Indeed, the U.S. Supreme Court has long recognized that the “trial court retains great latitude in deciding what questions should be asked on voir dire.” However, such latitude is not unlimited. The Morgan court made clear that a defendant’s Sixth and Fourteenth Amendment rights cannot be protected without adequate voir dire that will identify biased jurors. The Morgan court recognized that jurors might believe that they can follow the law, but in fact, they hold such beliefs about the death penalty that would prevent them from following the law, such as believing that all murderers should get the death penalty. Social science research has revealed that jurors are very poor predictors of their ability to follow the law given their views on the death penalty. Because jurors are such poor predictors, general questions about fairness and impartiality are insufficient to protect a defendant’s right to an impartial jury.

In response, the Illinois Supreme Court has said that limiting voir dire questioning to whether the jurors would automatically vote for the death penalty upon a finding of guilt goes beyond

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100 Id.
101 Id. at 735. In fact, during the voir dire of Morgan’s case, one juror stated that he could follow the court’s instructions on the law and then in response to the very next question, stated that he would automatically vote for the death penalty if Morgan was found guilty. Id. at 723-24 n.2, 735 n.9.
102 Ronald C. Dillehay & Marla R. Sandys, Life Under Wainwright v. Witt: Juror Dispositions and Death Qualification, 20 LAW & HUM. BEHAV. 147, 160 (1996). In their study, Dillehay and Sandys surveyed 148 former jurors in Kentucky who had served on a felony jury trial. Id. at 154. They asked these jurors whether their “attitude toward the death penalty [was] so strong that it would seriously affect [them] as [jurors] and interfere with [their] ability to perform [their] duties.” Id. at 155. Nearly 90% of those jurors answered no. Id. at 156. However, of those jurors, over 28% of them stated that “they would always give the death penalty to a person convicted of capital murder beyond a reasonable doubt.” Id. at 159.
103 See Morgan, 504 U.S. at 735.
general questions of fairness and impartiality, and is sufficient for identifying unqualified jurors. However, such a view ignores the inflammatory nature of statutory aggravating factors. For example, a juror might not believe that the death penalty is the only appropriate punishment for all murders, but might believe that the death penalty is the only appropriate punishment for child murders or multiple murders. Indeed, the CJP research reveals that many jurors feel this way. How are defendants supposed to determine if jurors have strong pro-death penalty views about child or mass murderers if all that defendants are allowed to ask is whether the jurors would automatically vote for death upon a finding of guilt? The Illinois Supreme Court has yet to provide a good answer.

While the trial court certainly has discretion in controlling the voir dire questioning, that discretion cannot trump a defendant’s right to an impartial jury. Consequently, a trial court’s discretion in voir dire in capital cases should be more limited than it would be in a typical criminal case. Indeed, the U.S. Supreme Court has limited a trial court’s discretion in voir dire in death

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106 Id. at 16.
107 John H. Blume et al., Lessons from the Capital Jury Project, in BEYOND REPAIR?: AMERICA’S DEATH PENALTY 151 tbl.1 (Stephen P. Garvey ed., 2003) [hereinafter Blume Lessons from CJP]; Bowers Foreclosed Impartiality, supra note 76, at 1505 tbl.6. For example, 14% of the South Carolina jurors surveyed by the CJP believed that the death penalty is the “only acceptable punishment” for convicted murderers whereas 52% of the jurors surveyed by the CJP believed that the death penalty is the only appropriate punishment for “[m]urders in which more than one victim is killed.” Blume Lessons from CJP, supra, at 151 tbl.1; Bowers Foreclosed Impartiality, supra note 75, at 1505 tbl.6.
108 See Brief for Defendant-Appellant Jackson, supra note 105, at 16.
penalty cases since Witherspoon.\textsuperscript{111} To further limit a trial court’s discretion and require it to allow defendants to question jurors about statutory aggravating factors would not be a departure from previous U.S. Supreme Court precedents or Illinois state court precedents. The Illinois Supreme Court and the Illinois appellate courts have placed a number of restrictions on the Illinois trial courts’ discretion in conducting voir dire.\textsuperscript{112} For example, Illinois trial courts are required to allow voir dire questioning on gangs,\textsuperscript{113} the insanity defense,\textsuperscript{114} criminal accountability,\textsuperscript{115} alcohol consumption or drug use,\textsuperscript{116} proof beyond a reasonable doubt,\textsuperscript{117} the defendant’s right to remain silent,\textsuperscript{118} the credibility of law enforcement officers\textsuperscript{119} and prior criminal victimization.\textsuperscript{120}

\begin{thebibliography}{9}
\bibitem{112} See generally Judge Michael P. Toomin, Jury Selection in Criminal Cases: Illinois Supreme Court Rule 431—A Journey Back to the Future and What it Portends, 48 \textit{DePaul L. Rev.} 83, 95–98 (1998) (discussing several different topics that attorneys are allowed to ask jurors in voir dire).
\bibitem{113} People v. Jimenez, 672 N.E.2d 914, 915, 917 (Ill. App. Ct. 1996) (holding that a defendant must be allowed to question jurors in voir dire about the defendant’s gang affiliation when the prosecution will present evidence of his gang affiliation).
\bibitem{114} People v. Stack, 493 N.E.2d 339, 344–45 (Ill. 1986) (holding that a defendant should be allowed to question prospective jurors in voir dire about whether they will “follow the statutory law of the insanity defense”).
\bibitem{115} People v. Davis, 447 N.E.2d 353, 360–61 (Ill. 1983) (finding no error in the prosecutor questioning potential jurors about whether they could follow the law of criminal accountability when the defendant did not do the actual shooting).
\bibitem{116} People v. Lanter, 595 N.E.2d 210, 214 (Ill. App. Ct. 1992) (holding that a trial court cannot prohibit voir dire questioning of jurors about their “feelings toward alcohol or drugs” when the defendant is raising the intoxication defense).
\bibitem{117} People v. Zehr, 469 N.E.2d 1062, 1063–64 (Ill. 1984).
\bibitem{118} \textit{Id.}
\bibitem{119} People v. Taylor, 601 N.E.2d 1305, 1306 (Ill. App. Ct. 1992) (noting that the trial court should have allowed voir dire questioning about “whether the prospective jurors would be more likely to believe the testimony of a police officer simply because he was a police officer”).
\bibitem{120} People v. Oliver, 637 N.E.2d 1173, 1178–79 (Ill. App. Ct. 1994).
\end{thebibliography}
Indeed, to require the trial courts to allow the defendants to question prospective jurors about statutory aggravating factors would not greatly diminish a trial court’s discretion in conducting voir dire.\textsuperscript{121} The trial court would only have to allow a few additional questions because the scope would be limited to the statutory aggravating factors that would be applicable to the particular case.\textsuperscript{122} Thus, to allow such questioning would not greatly increase the time or length of voir dire.\textsuperscript{123}

In sum, while the U.S. Supreme Court has recognized that trial courts do have discretion in conducting voir dire,\textsuperscript{124} it has also recognized that such discretion is not unlimited, especially in capital cases.\textsuperscript{125} Thus, a trial court’s discretion in conducting voir dire cannot supersede a defendant’s right to secure an impartial jury through adequate voir dire.\textsuperscript{126} A trial court’s desire to retain discretion in conducting voir dire is an insufficient reason for allowing trial courts to bar voir dire questioning on statutory aggravating factors, especially when such questioning would not consume a great deal more of the court’s time.\textsuperscript{127}

**C. Questioning Jurors About Aggravating Factors and “Stake Out” Questions**

The Arizona, North Carolina, and Mississippi Supreme Courts have all upheld a trial court’s denial of voir dire questioning regarding aggravating factors on the grounds that such questioning impermissibly seeks to have jurors precommit to a

\textsuperscript{121} See Brief for Defendant-Appellant Jackson, \textit{supra} note 105, at 17.

\textsuperscript{122} \textit{Id.} It is usually very clear what aggravating factors are applicable to the case because Illinois Supreme Court Rule 416(c) requires that the State provide notice of its intent to seek the death penalty and all of the statutory aggravating factors it intends to rely on at the sentencing hearing. \textsc{ill. sup. ct. r.} 416(c).

\textsuperscript{123} Brief for Defendant-Appellant Jackson, \textit{supra} note 105, at 17.


\textsuperscript{125} \textsc{E.g., Morgan v. Illinois}, 504 U.S. 719, 729-30 (1992).

\textsuperscript{126} \textsc{Eme}, \textit{supra} note 109, at 514–15.

\textsuperscript{127} See Brief for the Defendant-Appellant Jackson, \textit{supra} note 105, at 17.
sentencing decision before they have heard all the evidence (i.e., "stake out" questions). While the Illinois Supreme Court has not relied on such reasoning to uphold a trial court's limitation on voir dire questioning, such reasoning should be rejected because the questions are not impermissible "stake-out" questions but rather are questions designed to determine jurors' biases.

The U.S. Supreme Court has relied on the Adams/Witt dismissal standard to determine whether a juror should be dismissed for cause. The standard states that a juror should be dismissed for cause when a juror's view on capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." As the Court has relied on that standard in determining if the trial court erred in dismissing a juror who had strong anti-death penalty views, there is no reason why such a standard should not apply to jurors who have strong pro-death penalty views. Even if a State has an interest in having jurors that do not "frustrate the administration of a State's death penalty scheme," a defendant has an even more important interest in not having a jury "uncommonly willing to condemn a man to die." Indeed, the Morgan court supported such a view, noting that jurors who would automatically vote for the death penalty must be removed for cause because such jurors would have views that

131 See, e.g., Wainwright, 469 U.S. at 415–16, 434–35.
134 Witherspoon v. Illinois, 391 U.S. 510, 521 (1968); see also Brief of the Nat'l Ass'n of Criminal Defense Lawyers, supra note 133, at 8.
would substantially impair the performance of their duties as jurors.135

Thus, voir dire questions regarding statutory aggravating factors are not improper “stake out” questions but rather are questions seeking to determine whether jurors have death penalty views that will substantially impair the performance of their duties.136 The California Supreme Court has implicitly recognized such a view—stating that a trial court must permit voir dire questioning regarding the “general facts of the case” to determine if jurors are able to make a sentencing determination based on the “strength of aggravating and mitigating circumstances.”137 To allow the questioning of jurors in voir dire about statutory aggravating factors would not be so specific as to ask the jurors to make a predetermination on the death penalty issue because such questioning would not ask jurors to weigh mitigating and aggravating factors as they would in a sentencing determination; instead, the questioning is only targeted at determining jurors’ biases.138 Indeed, the CJP research shows that many allegedly impartial jurors harbor significant pro-death biases with certain general types of murder.139 The Illinois Supreme Court essentially takes the view that a prospective juror who believes, for example, that all perpetrators of premeditated murders deserve the death penalty does not harbor views that would substantially impair his duty as a juror to follow the law, which strips the Adams/Witt dismissal standard of any practical meaning.140

137 See id.
139 Bowers Foreclosed Impartiality, supra note 75, at 1505 tbl.6.
140 See Blume et al., supra note 65, at 1224 (“[A] juror who cannot set aside her belief that a death sentence is the only appropriate sentence for certain crimes is . . . constitutionally unqualified to serve on a capital jury.”). In fact, the U.S. Supreme Court has relied on jurors’ answers in voir dire about ag-
One response to this argument is that questioning jurors about statutory aggravating factors is no different than questioning jurors about whether they are willing to consider a particular piece of evidence to be potentially mitigating, and courts have repeatedly held that such questioning is improper "stake out" questioning. However, there is a significant difference between questioning jurors about statutory aggravating factors and questioning jurors about whether they are willing to consider certain evidence to be potentially mitigating. In many situations, the jury has little discretion in determining whether a given circumstance is aggravating. For example, if the State proves in the guilt phase that the defendant killed more than one person or killed a police officer in the line of duty, the jury must find that both of those circumstances are aggravating factors, making the defendant death-eligible. In contrast to the

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141 See, e.g., State v. Ross, 849 A.2d 648, 683 (Conn. 2004) (holding that a trial court could prohibit a defendant from questioning jurors in voir dire about whether they would consider the defendant’s "conduct in prison to be mitigating"); State v. Wilson, 659 N.E.2d 292, 300-01 (Ohio 1996) (holding that a defendant does not have a constitutional right to question prospective jurors about statutory mitigating factors).

142 But see Blume et al., supra note 65, at 1258–59 (arguing that trial courts must allow defendants to question prospective jurors in voir dire about whether they are willing to consider certain evidence to be potentially mitigating, because such questioning is designed to determine whether jurors are "prepared as the Supreme Court has said they must: to consider giving weight to mitigating factors").

143 See 720 ILL. COMP. STAT. 5/9-1(b) (2007).

144 See 5/9-1(b)(1), (3). This is assuming that the defendant was at least eighteen years of age at "the time of the commission of the offense" and is convicted of first degree murder. Id. About the only way that the jury does not
firm rules regarding certain aggravating factors, a jury does not have to find a defendant’s psychological history or past substance abuse to be mitigating but rather must only be willing to consider mitigating evidence on the whole. Thus, asking a juror whether he would automatically vote for the death penalty if the State proved that the defendant killed more than one person does not require the juror to precommit to determining that multiple murders is an aggravating factor because if the State proves that in the guilt phase, the juror must regard it as aggravating.

In sum, questioning jurors about statutory aggravating factors is not impermissible “stake-out” questioning. Rather, such questioning is designed to determine jurors’ biases and whether such biases would substantially impair their ability to perform their duties as jurors. Such questioning differs significantly from questioning jurors about whether they could consider certain evidence to be potentially mitigating.

IV. IMPACT

If the Illinois Supreme Court were to overturn its holding in People v. Hope and its progeny, as this Article has argued, two major questions emerge. First, what are the implications of requiring trial courts to allow voir dire questioning about statutory aggravating factors? Second, what are some typical questions that a trial court should allow regarding statutory aggravating factors? This Part discusses the implications of overturning Hope and its progeny and proposes some typical voir dire questioning that a trial court should allow.

find those circumstances to be aggravating factors is if the jury engages in jury nullification.

145 See 5/9-1(c), (g).
146 See 5/9-1(b)(3).
148 But see Blume et al., supra note 65, at 1258–59.
149 658 N.E.2d 391, 403–04 (Ill. 1995).
A. The Implications of Allowing Voir Dire Questioning About Statutory Aggravating Factors

The most significant implication of allowing defendants to question prospective jurors about statutory aggravating factors is that a greater percentage of jurors on a capital jury would be willing to do what the law requires them to do—to consider both aggravating and mitigating evidence.\textsuperscript{150} Jurors like those in the CJP, who would always give the death penalty based on a given aggravating circumstance such as a prior murder conviction, would be discovered during the voir dire process and then dismissed for cause.\textsuperscript{151} Consequently, the prosecution would no longer have the advantage of having a jury filled with jurors who are automatically willing to impose the death penalty based on the statutory aggravating factors in the case and only having to convince a few jurors to get a death sentence.\textsuperscript{152} At the same time, allowing this type of questioning would not completely frustrate Illinois prosecutors' ability to obtain death sentences. The State of California has one of the most liberal death penalty voir dire practices, as evidenced by its Supreme Court decisions

\textsuperscript{150} See 5/9-1(g).

\textsuperscript{151} Bowers \textit{Foreclosed Impartiality, supra} note 76, at 1505 tbl.6. In order to ensure juror candor, a trial court should allow for an individual, sequestered voir dire when the defendant questions prospective jurors on statutory aggravating factors because jurors are more willing to share information about themselves in such a setting and will not be influenced by how other potential jurors answer the questions. Blume et al., \textit{supra} note 66, at 1248–50. Of course, the onus will partly be on the defendants to discover these jurors, because it will be the defendants, and not the trial court, that will have the burden to ask jurors whether they would automatically vote for the death penalty based on a particular statutory aggravating factor. \textit{See, e.g.,} People v. Smith, 604 N.E.2d 858, 877 (Ill. 1992) (stating that a trial court is only required to ask jurors whether they would automatically vote for the death penalty upon a finding of guilt when the defendant requests such questioning).

\textsuperscript{152} See Eisenberg et al., \textit{supra} note 88, at 303 tbl.7; Bowers \textit{Foreclosed Impartiality, supra} note 75, at 1505 tbl.6; \textit{see also supra} text accompanying note 91.
in *People v. Kirkpatrick*\(^{153}\) and *People v. Cash*,\(^{154}\) yet California juries handed down 17 death sentences in 2006.\(^{155}\) Thus, there is no reason to think that Illinois prosecutors would not be able to obtain death sentences.

A second implication of allowing voir dire questioning on statutory aggravating factors is that the Illinois Supreme Court would no longer be obligated to follow this confusing interpretation of *Morgan*—that jurors who would automatically vote for the death penalty upon a finding of guilt cannot be impartial, but jurors who would automatically vote for the death penalty upon a finding of guilt and the presence of a particular statutory aggravating factor can be impartial.\(^{156}\) In addition, allowing this type of questioning reinforces one of the themes of the U.S. Supreme Court’s voir dire jurisprudence in death penalty cases—that capital juries must be impartial and be able to follow the law because jurors who refuse to consider mitigating evidence when certain statutory aggravating factors are present should no longer be serving on capital juries.\(^{157}\)

Another implication of allowing this questioning is that prosecutors would be able to ask jurors in voir dire whether they would automatically vote against the death penalty if a particular mitigating factor is present. Just as jurors who would auto-

\(^{153}\) 874 P.2d 248, 256–57 (Cal. 1994) (stating that prospective jurors who would automatically vote for or against the death penalty based on the general facts likely to be shown at trial can be dismissed for cause).

\(^{154}\) 50 P.3d 332, 342–43 (Cal. 2002) (holding that the trial court erred in refusing to allow the defendant to question jurors in voir dire whether they would automatically vote for death if they were informed that the defendant had been previously convicted of murder).


\(^{156}\) See, e.g., *People v. Hope*, 658 N.E.2d 391, 403–04 (Ill. 1995).

matically vote for the death penalty if a particular statutory aggravating factor is present are unable to follow the law, jurors who would always vote against the death penalty if a particular mitigating factor is present also would be unable to follow the law.\textsuperscript{158}

A more difficult question is whether defendants can question prospective jurors about whether they are willing to consider particular evidence such as substance abuse or being abused as a child as being potentially mitigating. Some scholars have argued that \textit{Morgan} requires such questioning.\textsuperscript{159} However, courts have rejected that argument for the most part.\textsuperscript{160} The difficulty of requiring such questioning is that the Illinois statute only requires jurors to consider mitigating evidence on the whole, not that they must also find certain evidence to be mitigating.\textsuperscript{161} Therefore, this line of questioning would not reveal jurors who are unable to follow the law because jurors can still follow the law and not consider particular evidence to be potentially mitigating.\textsuperscript{162} In short, requiring voir dire questioning on statutory aggravating factors will not necessarily require trial courts to also allow questioning about whether jurors are willing to consider certain evidence to be potentially mitigating.

An additional implication of allowing voir dire questioning on statutory aggravating factors is that a trial court’s discretion in conducting voir dire would be further limited. Indeed, this ques-
tioning would just add to the laundry list of different topics on which the trial court must already allow in voir dire. While requiring this type of questioning would be a change for trial courts conducting voir dire in death penalty cases, it would not radically change the voir dire process, especially because the trial court would only be required to allow a few extra questions.

One open question in allowing this expanded death penalty voir dire, or "death-qualification," is whether this will affect the conviction proneness of capital juries. Several studies have found that death qualification causes juries to be more conviction prone. A few theories have been given for these results. First, requiring attorneys and the judge to spend a significant amount of time in voir dire on the penalty phase of the trial plants the seed in the potential jurors' minds that the defendant is guilty. In other words, potential jurors think that the attor-

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163 See Toomin, supra note 112, at 95–98.
164 Brief for Defendant-Appellant Jackson, supra note 105, at 17.
165 Courts and scholars often refer to the voir dire process in which the attorneys question jurors to determine which ones have such strong anti-death penalty views that they must be dismissed for cause as "death qualification." E.g., Lockhart v. McCree, 476 U.S. 162, 167–68 (1986); Claudia L. Cowan et al., The Effects of Death Qualification on Jurors' Predispositions to Convict and on the Quality of Deliberation, 8 LAW & HUM. BEHAV. 53, 54 (1984). Some scholars and the Illinois Supreme Court have referred to the voir dire required by Morgan as "life qualification." E.g., People v. Hope, 658 N.E.2d 391, 403 (Ill. 1995); Craig Haney, Death by Design: Capital Punishment as a Social Psychological System 134 (2005). For the sake of simplicity, this Article will use the term "death qualification" when referring to all voir dire questioning on jurors' death penalty attitudes.
166 E.g., Cowan et al., supra note 165, at 63–65, 67–69 (finding that death-qualified jurors were more likely to vote guilty than non-death qualified jurors after watching a videotaped reenactment of a homicide case); Mike Allen et al., Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis, 22 LAW & HUM. BEHAV. 715, 720–22, 724 (1998) (concluding after doing a meta-analysis of fourteen different studies that studied the relationship between death penalty views and conviction proneness that "the more a person favors the death penalty, the more likely that person is to vote to convict a defendant").
167 Haney, supra note 165, at 121.

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neys and the judge would not ask so many questions about the death penalty if the defendant was not guilty. Second, death-qualified jurors may be "perceptually ready" to view evidence as incriminating and view the prosecution's witnesses in a more positive light than non-death-qualified jurors. This relationship between death qualification and conviction proneness is certainly troubling and is in need of further study.

However, three things should be noted about the relationship between conviction proneness and death qualification. First, it is impossible to determine what would be an ideal conviction rate. Thus, it would be difficult to determine whether death qualification is leading to innocent defendants being convicted. Second, the U.S. Supreme Court has already soundly rejected the argument that death qualification is unconstitutional, even if death qualification produces more conviction prone juries. Therefore, at least in the short-term, questioning jurors about their death penalty attitudes is here to stay. Third, to not allow attorneys to question prospective jurors about their death penalty views would leave the voir dire process with the same problem that has been the focus of this Article—the inability to determine if potential jurors will be impartial and follow the law. Consequently, the short-term focus should be on improving the voir dire system of questioning jurors about their views.

168 Id.
169 Id. at 110.
170 This is especially true considering that most of the studies that have looked at the death qualification and conviction proneness relationship were done before the Morgan decision. See Allen et al., supra note 166, at 727-28 (listing the studies that were a part of their meta-analysis). It is unclear how the requirements of Morgan have affected the conviction proneness of capital juries.
171 See Haney, supra note 165, at 110.
172 See Rozelle, supra note 55, at 693.
death penalty attitudes rather than scrapping all questioning of jurors on those attitudes.

B. The Type of Questioning That Should be Allowed

In determining what kind of voir dire questions should be allowed, two competing interests exist. On the one hand, a trial court should be allowed to maintain some of its traditional discretion in controlling the voir dire process. On the other hand, a defendant must be allowed to conduct adequate questioning that will allow him to determine whether prospective jurors will automatically vote for the death penalty based on the statutory aggravating factors in the case. In People v. Cash, the California Supreme Court provided some guidance that should help Illinois trial courts determine the type of questioning it should allow:

[D]eath qualification should avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented.

A trial court can use its discretion to deny voir dire questioning that gives jurors detailed and specific facts about the case and then asks if the jurors would automatically vote for the death penalty based on those facts. However, a trial court cannot

176 See People v. Cash, 50 P.3d 332, 342–43 (Cal. 2002).
177 Id. at 342.
178 People v. Jenkins, 997 P.2d 1044, 1106–07 (Cal. 2000) (finding no error in the trial court denying voir dire questioning of a juror where the defendant gave a “detailed account of the facts of the case”).
use its discretion to prohibit voir dire questioning regarding a
general fact of the case such as the defendant being previously
convicted of murder. 179

A defendant, at a minimum, should be allowed voir dire ques-
tioning that relies on the statutory language of the aggravating
factors in the Illinois death penalty statute. 180 For example, in a
multiple murder case, a defendant should be allowed to ask po-
tential jurors whether they would automatically vote for the
death penalty "if the defendant were found guilty of two
murders," 181 or, in the case involving the murder of a police of-
fisher in the line of duty, whether the jurors would automatically
vote for the death penalty if the defendant were found guilty of
murdering a peace officer "in the course of performing his offi-
cial duties." 182 In contrast, a trial court could use its discretion to
prohibit a detailed fact-specific question, such as whether the
jurors would automatically vote for the death penalty if they
found that the defendant had stabbed his live-in girlfriend mul-
tiple times and then suffocated her with a pillow following an
argument over drugs and money and then grabbed his two year-
old and three year-old children while they were sleeping and
drowned them in a bathtub. 183 Such a question would veer to-
wards being the overly specific death-qualification questioning
that People v. Cash warned against allowing. 184

The benefit of relying on the statutory language of the aggra-
vating factors is that it will, in many instances, identify those
jurors who will not consider mitigating evidence because of the

179 50 P.3d at 342–43 (finding reversible error in which the trial court did not
allow the defendant to question prospective jurors about whether they would
automatically vote for the death penalty if they were told that the defendant
had been convicted of a prior murder).


181 Brief for Defendant-Appellant Harris, supra note 57, at 58 (quoting R.
2279); see 720 ILL. COMP. STAT. 5/9-1(b)(3) (2007).

182 5/9-1(b)(1).

183 See People v. Brown, 665 N.E.2d 1290, 1298–99 (Ill. 1996) (summary of
the facts of the case).

184 See People v. Cash, 50 P.3d 332, 342 (Cal. 2002).
statutory aggravating factors in the case,\textsuperscript{185} and at the same time, not allow a defendant to pre-try the case in voir dire.\textsuperscript{186} The downside to such an approach is that some of the statutory aggravating factors use language that an average juror will not understand. For example, a defendant is death eligible if he murders a person under the age of 12 and "the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty," or if he commits a murder "in a cold, calculated, and premeditated manner pursuant to a preconceived plan, scheme, or design."\textsuperscript{187} Many potential jurors lack a post-high school education,\textsuperscript{188} and most potential jurors are not lawyers.\textsuperscript{189} Therefore many potential jurors will not understand, for example, the meaning of "brutal or heinous behavior indicative of wanton cruelty," because jurors do not receive instructions on the law at the jury selection phase.\textsuperscript{190}

The solution to those situations where the statutory aggravating factor uses a term with a precise legal meaning\textsuperscript{191} is to allow the defendant more leeway in using general facts of the case to question prospective jurors about that aggravating factor. For

\textsuperscript{185} See Brief for Defendant-Appellant Harris, supra note 57, at 59; see also The Harvard Law Review Association, supra note 55, at 191 (stating that "[t]he art of discovering a person's true sentiments lies in the interrogator's ability to formulate direct questions targeted at specific subjects.").

\textsuperscript{186} See 50 P.3d at 342.


\textsuperscript{188} U.S. CENSUS BUREAU, Illinois, Population & Housing Narrative Profile, in 2006 AMERICAN COMMUNITY SURVEY (2006), available at http://factfinder.census.gov/servlet/NPTable?_bm=y&-qr_name=ACS_2006_EST_G00_NP01&-geo_id=04000US17&-gc_url=null&-dsname=&-_lang=en&-redo-Log=false (noting that 44% of those twenty-five or older in Illinois have the education level of a high school degree or less).

\textsuperscript{189} U.S. DEP'T OF LABOR: BUREAU OF LABOR STATISTICS, MAY 2006 OCCUPATIONAL EMPLOYMENT AND WAGES (2006), http://www.bls.gov/oes/current/oes231011.htm (stating that less than 1% of those employed in Illinois are employed as lawyers).

\textsuperscript{190} See Blume et al., supra note 65, at 1244 (discussing the difficulties potential jurors have in understanding the law).

example, if the defendant is accused of drowning his two children and, if found guilty, is death eligible due to the presence of the statutory aggravating factor of murdering an "individual under 12 years of age and the death resulting from exceptionally brutal or heinous behavior," a defendant should be permitted to ask jurors in voir dire whether they would automatically vote for the death penalty if they found that the defendant had drowned his two children. Again, such questioning would strike a balance between the two extremes that People v. Cash warns against. But it should be kept in mind that the trial court should retain some discretion in determining which general facts the defendant can use when questioning jurors in voir dire about statutory aggravating factors.

V. Conclusion

Despite a clear requirement in the statute that jurors must consider both aggravating and mitigating factors in determining whether to impose a death sentence in a capital case, the Illinois Supreme Court has routinely allowed trial courts to prohibit voir dire questioning on statutory aggravating factors that would allow the defendant to determine if prospective jurors are prepared to act as the law requires. The Illinois Supreme Court has repeatedly reasoned that Morgan only requires trial judges to allow questioning on whether jurors would automatically vote to impose the death penalty upon a finding of guilt—no more, no less. However, such a view is problematic.

192 See People v. Brown, 665 N.E.2d 1290, 1298–99, 1310 (Ill. 1996) (finding that the defendant was death eligible after he was convicted of drowning his two children (quoting ILL. REV. STAT. 1989, ch. 38, par. 9-1(b)(7))).
193 See People v. Cash, 50 P.3d 332, 342 (Cal. 2002).
195 720 ILL. COMP. STAT. 5/9-1(g) (2007); see, e.g., People v. Hope, 659 N.E.2d 391, 403–04 (Ill. 1995).
196 E.g., Hope, 658 N.E.2d at 403–04.
Morgan establishes that impartial jurors must be able to consider both aggravating and mitigating evidence as instructed by the court, and defendants must be allowed adequate voir dire to determine if prospective jurors can follow the court’s instructions.\textsuperscript{197} Indeed, it is clear, based on the findings of the CJP, that asking jurors whether they would automatically vote for the death penalty upon a finding of guilt is inadequate in determining whether potential jurors are capable of following the law and considering both aggravating and mitigating factors.\textsuperscript{198} While trial courts certainly have discretion in how voir dire is conducted, such discretion does not have priority over defendants’ due process rights to an impartial jury.\textsuperscript{199} Questioning jurors in voir dire about statutory aggravating factors is not an attempt to seek a precommitment to a sentencing decision from prospective jurors. Rather, it is aimed toward finding those jurors who, because of the statutory aggravating factors in the case, cannot be impartial and consider both death and non-death sentences.\textsuperscript{200}

By allowing just a few more questions, the Illinois Supreme Court can ensure that the Illinois death penalty statute means what it says—that jurors must consider both aggravating and mitigating factors when considering imposing death. This would greatly improve the due process rights of capital defendants, and with defendants’ lives hanging in the balance, is that such a burdensome requirement?

\textsuperscript{198} See Bowers Foreclosed Impartiality, supra note 75, at 1505 tbl.6.
\textsuperscript{199} See Eme, supra note 109, at 514–15.
\textsuperscript{200} See People v. Cash, 50 P.3d 332, 342 (Cal. 2002).