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DELAWARE’S CAPITAL JURY SELECTION: INADEQUATE VOIR DIRE AND THE PROBLEM OF AUTOMATIC DEATH PENALTY JURORS

Adam M. Gershowitz*

Like the other thirty-seven states that authorize capital punishment, Delaware has a bifurcated system whereby the guilt phases and the sentencing phases of capital trials are distinct and separate.¹ As in all other death-penalty states, after an individual’s conviction, the final sentencers² must entertain any evidence mitigating against the im-

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1. See Gregg v. Georgia, 428 U.S. 153 (1976) (affirming Georgia’s modified capital punishment scheme, at least in part, because the guilt and sentencing phases had been bifurcated). The procedures upheld in Gregg, especially the existence of a bifurcated trial, have remained, for the most part, integral requirements to the constitutionality of states’ death-penalty statutes. But see Marla Sandys, The Capital Jury Project: Cross-Over—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines, 70 Ind. L.J. 1183, 1220 (1995) (unfortunately noting that “although capital cases may be conducted as bifurcated proceedings, the majority of jurors reach their decisions about guilt and punishment at the same time — prior to the penalty phase of the trial”).

2. Of the 38 states that allow the imposition of capital punishment, 28 states place the sentencing decision in the hands of a jury. In four states — Arizona, Idaho, Montana, and Nebraska — juries do not participate in the sentencing phase and a judge determines a defendant’s sentence. In another four states — Alabama, Delaware Florida, and Indiana — juries make sentencing recommendations to judges who themselves make the final sentencing decisions. In Nevada juries are vested with full sentencing authority, but a three-judge panel can overrule their decision.
position of the death penalty. During this phase, itself conducted like a mini-trial, sentencers weigh whether a convicted individual is deserving of the death penalty. Should the sentencers fail to find mitigating evidence, or should they determine that the mitigating evidence is insufficient to outweigh the aggravating circumstances of the case, the defendant is likely to be sentenced to death.

In most death-penalty states, jurors are the final fact-finders who weigh the aggravating and mitigating evidence and undertake the powerful job of deciding whether to sentence an individual to life imprisonment or to death. However, four states have a

3. Mitigating evidence is that which reduces the defendant's culpability for the offense. For instance, the fact that a defendant was mentally retarded or that he only participated in the crime in a minor way is mitigating evidence. See Lockett v. Ohio, 438 U.S. 586, 604 (1978) (requiring that "the sentencer, in all but the rarest kind of capital case not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (footnote omitted)).


5. The United States Supreme Court has made it clear, however, that the right to a jury does not extend to the sentencing phase of capital trials. See Harris v. Alabama, 513 U.S. 504 (1995); Clemons v. Mississippi, 494 U.S. 738 (1990); Walton v. Arizona, 497 U.S. 639 (1990); Cabana v. Bullock, 474 U.S. 376 (1986); McMillan v. Pennsylvania, 477 U.S. 79 (1986); Spaziano v. Florida, 468 U.S. 447 (1984). It is interesting to note, though, that despite the lack of a constitutional requirement, 28 states vest the ultimate sentencing decision in the hands of a jury in capital cases. Additionally, four states — the focus of this article — ask jurors to make sentencing recommendations in capital cases. Considering that nearly all sentencing decisions in noncapital cases are left to judges, the fact that so many states involve juries in capital sentencing indicates that death really is "different." In Woodson v. North Carolina, the Supreme Court noted that "the penalty of death is qualitatively different from a sentence of life imprisonment" and gave birth to the idea that capital sentencing must be undertaken with increased carefulness and concern. 428 U.S. at 305. As such, the Court has, in some instances, enunciated strict requirements about the procedures utilized in capital cases based on the notion that "death is different." Interestingly, although the Supreme Court itself has declined to extend "death is different" jurisprudence to require states to afford jury participation at the sentencing phase of capital trials, most states have taken it upon themselves to determine that "death is different" by involving juries in the sentencing phase of capital trials.
slightly different capital punishment system: In Alabama, Delaware, Florida, and Indiana, jurors still undertake the difficult task of weighing aggravating and mitigating evidence, but they do so only in an advisory function. In these four states, capital juries review the evidence for and against the death penalty and then recommend a sentence. In this respect, jurors are still intimately tied to the sentencing decision; however, they are not the final decision-makers. Thus, some might argue that impaneling an impartial jury in the four “recommending” states is less important than impaneling an unbiased jury in the twenty-eight states where jurors directly decide a defendant’s sentence. This, however, could not be further from the truth.

In actuality, selecting impartial jurors in the recommending states is of greater significance than impaneling impartial jurors in the direct-decision states. This is because a jury in the recommending states need not be unanimous in recommending a sentence of death, with the result that non-unanimous sentencing verdicts can range from eleven-


7. See, e.g., Spaziano v. Florida, 468 U.S. 447 (1984). In fact, in Alabama, Delaware, Florida, and Indiana, a majority of jurors can recommend a sentence of life imprisonment only to have a judge subsequently impose a death sentence. See Michael L. Radelet & Michael Mello, Death to Life Overrides: Saving the Resources of the Florida Supreme Court, 20 Fla. St. U. L. Rev. 196, 196 (1992) (noting that in Florida between the resurrection of capital punishment in 1976 and 1992, 134 individuals were sentenced to death by judges in spite of jury recommendations for life sentences). Professor Radelet has asserted that jury overrides comprised 25% of Florida’s death sentences. See Michael L. Radelet, Rejecting the Jury: Imposition of the Death Penalty in Florida, 18 U.C. Davis L. Rev. 1409, 1412-13 (1985). In Alabama, as of late 1994, judges had imposed death even after juries had recommended life imprisonment in 47 different cases. See Harris v. Alabama, 513 U.S. 504, 513 (1995) (citing the Alabama prison project). Judges in Indiana — through 1994 — imposed death in eight cases in which juries had recommended life sentences. See Harris, 513 U.S. at 522 n.8 (Stevens, J., dissenting) (citing a memorandum from the Indiana Public Defender Council). Of the four recommending states, only Delaware judges have declined to invoke their privilege to override a jury’s recommendation for life in order to impose a death sentence. In Delaware, two seven-to-five jury recommendations in favor of the death penalty have resulted in judges imposing death sentences. See Manley v. State, 709 A.2d 643 (Del. 1998), cert. denied, 119 S. Ct. 214 (1998); Outten v. State, 650 A.2d 1291 (Del. 1994). However, no death sentence has been imposed when less than a majority of the jury voted for death. The fact that Delaware judges have not overridden juries’ majority votes for life seems to indicate that Delaware judges are more responsive to the recommendations of capital juries than judges in Alabama, Florida, and Indiana. The importance of this cannot be overstated and will become apparent as we discuss the need for more in-depth voir dire questions in Delaware. See infra notes 118-28 and accompanying text.
to-one to six-to-six. In deciding whether to impose death, judges in the recommending states must look to these nonunanimous jury recommendations for guidance. The larger the number of jurors who vote for death, theoretically the more likely it becomes that a judge will sentence an individual to death. A judge may therefore be more likely to impose a death sentence if seven of twelve jurors recommend death than if only six jurors recommend the death penalty. Thus, each juror's vote seems to count individually in the recommending states, rather than collectively as it does in the direct-decision states. If we assume that jurors in the recommending states count as "individuals" and if we further assume that judges base their sentencing decisions, at least in part, on the number of jurors who voted for death, then impaneling impartial jurors is crucial.


9. Although this may not be true in Florida and, to some extent, Indiana and Alabama (see supra note 7), it does appear to be true in Delaware. See infra notes 121-28 and accompanying text discussing the fact that Delaware judges have not imposed a death sentence unless a majority of the jury voted for death.

10. But see Radelet & Mello, supra note 7, at 196 noting that in Florida, even where juries have recommended life imprisonment by large majorities, even unanimous recommendations, judges have nevertheless imposed death.

11. See Witherspoon v. Illinois, 391 U.S. 510, 523 n.21 (1968) (holding that jurors can be excused for cause from capital trials if they would automatically vote against the death penalty or if their attitudes would keep them from making an impartial decision about the defendant's guilt). See infra notes 15-34 and accompanying text explaining the Witherspoon decision.
of death — and life qualification\(^\text{12}\) — a process ensuring that a juror is capable of considering life imprisonment instead of automatically voting for the death penalty — is even more important in the recommending states than in the twenty-eight death-penalty states where juries have the final say as to a defendant's punishment but must be unanimous in order to impose the death penalty.

This article primarily analyzes life qualification in Delaware. Part I reviews the key United States Supreme Court decisions addressing death and life qualification. Part II then analyzes the existing social science research on the prevalence of automatic-death-penalty (adp) jurors (jurors who would automatically impose the death penalty irrespective of the mitigating evidence and who should be eliminated from the jury pool through life qualification). After reviewing the Supreme Court's rationale for disallowing adp jurors and the social science data estimating their prevalence in society, Part III of this article examines voir dire questioning in Delaware and assesses the success of that questioning in eliminating adp jurors. Part IV then critically analyzes Manley v. State,\(^\text{13}\) the Delaware Supreme Court's recent decision refusing to mandate more expansive voir dire. Part V of this article discusses the need and constitutional basis for more in-depth voir dire to eliminate adp prospective jurors. Finally, Part VI focuses on the potentially deadly role adp jurors can play in the four states, particularly Delaware, where jurors may recommend a sentence of death.\(^\text{14}\)

\(^{12}\) See Morgan v. Illinois, 504 U.S. 719, 735-736 (1992) (holding that a capital defendant is entitled to ask prospective jurors if they would automatically vote for the death penalty if they found the defendant guilty). See infra notes 53-68 and accompanying text detailing the Morgan decision.

\(^{13}\) 709 A.2d 643.

\(^{14}\) This article does not criticize the statutory schemes of Alabama, Delaware, Florida, and Indiana that allow judges to override jury votes for life. For such an indictment see Radelet & Mello, supra note 7, at 204-05. Though this is undoubtedly an important issue, it has been omitted from analysis here because to this date there has not been a life-to-death override in a Delaware capital trial. Delaware is unique in that it is the only "recommending" state in which a life-to-death override has not occurred.
I. FROM WITHERSPOON TO MORGAN

The Supreme Court's first major statement on the problems of pro- or anti-death-penalty bias in capital cases came in 1968 in Witherspoon v. Illinois,15 four years before the Court's landmark Furman decision.16 Leading up to Furman, support for the death penalty in America had dropped to an all-time low; support for capital punishment hovered just below the fifty-percent benchmark17 and was in fact part of the Court’s rationale in Furman v. Georgia for holding all existing death-penalty laws to be unconstitutional.18 At issue in Witherspoon was whether prospective jurors who had qualms about the death-penalty could be excused for cause from serving on a capital jury.19 In Illinois, a statute provided that “[i]n trials for murder it shall be a cause for challenge of any juror


16. In Furman v. Georgia, 408 U.S. 238 (1972), a deeply splintered Court held all then-existing death-penalty laws to be unconstitutional because they were arbitrary, capricious, and discriminatory in that they provided no statutory guidance to help judges and juries to choose between life and death. The Court’s rationale — that the arbitrariness of the death-penalty laws constituted cruel and unusual punishment in violation of the Eighth Amendment — engendered a tremendous amount of criticism, especially in light of the fact that the Court had failed to come to such a conclusion a year earlier in McGautha v. California, 402 U.S. 183 (1971), a case in which the Court declined to find that the arbitrary imposition of the death penalty violated the due process clause of the Fourteenth Amendment. Although the general public’s support for the death penalty dropped below 50% and no one had been executed in the United States since 1967, the response to Furman was swift. Thirty-five states promptly redrafted their death-penalty laws and the Supreme Court then upheld Georgia’s law (along with Florida’s and Texas’ capital punishment schemes) as a model in 1976. See Gregg v. Georgia, 428 U.S. 153 (1976); Proffit v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).


18. See supra note 16.

who shall, on being examined, state that he has conscientious scruples against capital
punishment, or that he is opposed to the same."\textsuperscript{20} This language enabled the prosecutor
to eliminate all prospective jurors who had qualms or scruples about the death penalty
from sitting in Witherspoon's case. In total, forty-seven jurors were eliminated because of
their views on the death penalty,\textsuperscript{21} even though only five of them stated that they would
be unable to vote for the death penalty under any circumstances.\textsuperscript{22} Witherspoon con­tended that the jury selection procedure in his case should be held unconstitutional be­cause it biased the jury in favor of both conviction and a death sentence.\textsuperscript{23} The petitioner
argued that by eliminating all potential jurors with qualms about the death penalty, the
prosecutor was "stacking the deck" against him. First, Witherspoon maintained that a
jury devoid of individuals with scruples against the death penalty was more likely to
convict because death penalty opponents would be less conviction prone.\textsuperscript{24} Witherspoon
attempted to buttress his claim with a few unpublished studies.\textsuperscript{25} The Court, however,
concluded that his proof was "too tentative and fragmentary" to demonstrate that a death­qualified jury was biased toward convicting the defendant\textsuperscript{26} and refused to decide whether
death qualification biased the jury in favor of conviction.\textsuperscript{27} However, the Court did con-

\begin{itemize}
  \item 20. \textit{Id.} at 512 (quoting ILL. REV. STAT. ch. 28, § 743 (1959)).
  \item 21. \textit{Id.} at 514.
  \item 22. \textit{Id.}
  \item 23. \textit{Id.} at 516-18.
  \item 24. \textit{Id.} at 517.
  \item 25. \textit{See id.} at 517 n.10. Two studies were surveys of college students. A third study
  utilized 1,248 interviews with jurors and concluded that a jury without individuals opposed to the
death penalty would be more likely to convict.
  \item 26. \textit{Id.} at 517-18.
  \item 27. Although the Court in \textit{Witherspoon} refused to decide whether death qualification
  has a biasing effect, the Court ultimately agreed to consider this question in \textit{Lockhart v. McCree},
476 U.S. 162 (1986). In \textit{McCree} the Court outrightly rejected the contention that death qualifica­
tion biases the jury in favor of conviction even in the face of more recent impressive scholarly
respondents were more conviction prone). \textit{See also Claudia L. Cowan, et al., The Effects of Predispo­sition to Convict on the Quality of Deliberation, 8 LAW \& HUM. BEHAV. 53 (1984) (reporting statis­
tically significant findings that death-qualified sample juries are more likely to convict than sample
juries which included \textit{Witherspoon} excludables).}
clude that the Illinois jury-selection procedure violated the Sixth and Fourteenth Amendments with regard to the sentencing phase.28

In light of the fact that half of the population opposed capital punishment, Justice Stewart, writing for the majority, concluded that a jury selection procedure that eliminated virtually everyone with opposition to capital punishment did not express the community’s conscience.29 According to Justice Stewart, “In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.”30 The Court reversed Witherspoon’s sentence31 and noted in a footnote, as guidance for future cases, that prospective jurors could be excused for cause if they would automatically vote against the death penalty or if their attitudes would keep them from making an impartial decision about the defendant’s guilt.32

Justice Black, writing in dissent, contended that “the real holding in [Witherspoon] is, at least to me, very ambiguous.”33 Justice Black saw no discernible difference between asking prospective jurors if they have conscientious scruples against the infliction of capital punishment and asking them if they would automatically vote against the death penalty.34

Despite Justice Black’s contention that Witherspoon was unclear, the Court’s next significant decision about death qualification did not come until twelve years later in

29. Id. at 519.
30. Id. at 520-21.
31. Id. at 523.
32. Id. at 523 n.21.
33. Id. at 538 (Black, J., dissenting). Interestingly, although Justice Black argued that the Court’s Witherspoon decision was unclear, in retrospect, Witherspoon proved to be the most lucid of the Court’s death-qualification opinions. See infra note 43 and accompanying text discussing how Adams v. Texas, 448 U.S. 38 (1980), and Wainwright v. Witt, 469 U.S. 412 (1985), drastically departed from the clarity of Witherspoon.
34. Witherspoon, 391 U.S. at 538 (Black, J., dissenting).
Adams v. Texas,35 a case involving the Texas capital sentencing scheme.36 In Adams, the Court departed from Witherspoon's command that jurors only be excluded if it was unmistakably clear that they would automatically vote against the death penalty. The Adams Court instead determined that a juror could be excused for cause if his views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."37 The Adams decision was a substantial departure from the more inclusive Witherspoon holding. Possibly because of the great difference between the language in Adams and Witherspoon, the Court decided to hear another death-qualification case, Wainwright v. Witt,38 only five years after Adams.

After reviewing the differing language in Adams and Witherspoon, Justice Rehnquist, speaking for the Court in Witt, determined that the language in Adams was preferable.39 Justice Rehnquist explained that, in addition to being dicta, the statements in Witherspoon requiring unmistakable clarity that a juror would automatically vote against


36. The Texas scheme — upheld by the Supreme Court in Jurek v. Texas, 428 U.S. 262 (1976) — requires jurors to answer three questions at the sentencing phase: First, jurors are asked whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or defendant would result. Second, jurors must answer whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Finally, jurors decide whether the conduct of the defendant in killing the deceased was unreasonable in response to any provocation, if any, by the deceased. The second part of this three-part question in Texas — future dangerousness — has been the subject of much debate by capital punishment scholars. Some scholars suggest that future dangerousness is extremely difficult to predict. See James W. Marquart et al., Gazing Into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?, 23 L. & Soc'y Rev. 449, 464 (1989) (noting that "predicting future dangerousness appears to depart little from gazing into a crystal ball when it comes to determining the fate of capital offenders"). The issue of future dangerousness is particularly relevant to the adp question. Experts may testify at the sentencing phase of capital trials to the fact that a defendant would pose a future risk to society should he be allowed to live. Adp jurors, already inclined to impose the death penalty, would not hesitate to accept this testimony, thus neglecting their duty to scrutinize the aggravating circumstances, in this case testimony by an expert that the defendant is potentially dangerous.

37. Adams, 448 U.S. at 45.


39. Id. at 421.
the death penalty were unwise, 40 because "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.'" 41 Therefore, the Court held that the more flexible language in Adams allowing exclusion of a juror whose views would "prevent or substantially impair his duties as a juror in accordance with his instructions or his oath" should be the governing standard for death qualification. 42 Justice Rehnquist acknowledged that this standard lacked clarity, 43 but he claimed that the discretion to determine whether a juror was unable to fulfill her duties was better left to the trial judge, rather than to a rigid standard. 44

Although the Witt standard was less clear than the Witherspoon language, it is obvious that Witt made it easier to excuse prospective jurors with some degree of opposition to the death penalty. 45 Whereas a challenge for cause under Witherspoon required

40. Id. at 422-25.

41. Id. at 424-25.

42. Id. at 425.

43. Although Justice Rehnquist acknowledged that the Witt standard lacked clarity, this issue was seemingly brushed aside. Undoubtedly, the opaque standard in Witt is less lucid than the Witherspoon standard requiring that it be unmistakably clear that a juror would automatically vote against the death penalty. One scholar has pointed out that "Witt fails woefully to determine who could and who could not perform the duties of a juror." See Marla Sandys, Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 285, 290 (James R. Acker et al. eds., 1998) (hereinafter Sandys, Stacking the Deck). As such, in retrospect, it seems that Justice Black, dissenting in Witherspoon, was unduly harsh in condemning the lack of clarity in the Witherspoon standard, for that standard was considerably more clear than the language promulgated in Adams and reiterated in Witt.

44. Witt, 469 U.S. at 425-26.

45. See Sandys, Stacking the Deck, supra note 43, at 289 stating that "Witt relaxes the standard, thereby increasing the range of prospective jurors who may be dismissed from serving on a capital case." In dissent in Witt, Justice Brennan, joined by Justice Marshall, argued that the Court had misinterpreted Adams. According to Justice Brennan, "Nothing in Adams suggests that the Court intended to abandon Witherspoon's strict standards of proof." Witt, 469 U.S. at 451 (Brennan, J., dissenting). According to Justice Brennan, the Witt Court misinterpreted Adams to establish "an entirely new standard significantly more lenient than that of Witherspoon ... [which] ... no longer prohibits exclusion of uncertain, vacillating, or ambiguous prospective jurors." Id. at 452 (Brennan, J., dissenting).
“unmistakable clarity”\textsuperscript{46} to eliminate a prospective juror, under \textit{Witt} a judge may excuse jurors if they are “substantially impaired”\textsuperscript{47} from carrying out their duties.

In addition to revising the standard for those jurors who could never impose the death penalty, \textit{Wainwright v. Witt} insinuated that a juror could also be “substantially impaired” if she would automatically impose the death penalty. Three years later, in \textit{Ross v. Oklahoma},\textsuperscript{48} the Court broached this issue of automatic-death-penalty, or adp, jurors. At issue in \textit{Ross} was an Oklahoma trial court’s decision refusing to remove for cause a juror who declared that he would automatically vote for the death penalty should the defendant be found guilty.\textsuperscript{49} This juror was eventually removed from the \textit{venire} via a peremptory challenge.\textsuperscript{50} The Supreme Court, although finding a constitutional error in the Court’s failure to remove this juror, denied Ross relief because the juror, excused by a peremptory challenge, had not actually sat for the case.\textsuperscript{51} The Court did note, though, that “had [the juror] sat on the jury that ultimately sentenced petitioner to death . . . the sentence would have to be overturned.”\textsuperscript{52}

The Court’s statement on automatic-death-penalty jurors in \textit{Ross} was merely \textit{dicta}. The adp issue arose again, however, and the Court had the opportunity to rule on the subject four years later in \textit{Morgan v. Illinois}.\textsuperscript{53} During jury selection in his capital trial, Derrick Morgan sought to have the judge ask prospective jurors, “If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?”\textsuperscript{54} The State of Illinois did not dispute Morgan’s contention that adp jurors

\begin{itemize}
  \item \textsuperscript{46} \textit{Witherspoon}, 391 U.S. at 523 n.21.
  \item \textsuperscript{47} \textit{Witt}, 469 U.S. at 425.
  \item \textsuperscript{48} 487 U.S. 81 (1988).
  \item \textsuperscript{49} \textit{Id.} at 83
  \item \textsuperscript{50} \textit{Id.}
  \item \textsuperscript{51} \textit{Id.} at 86.
  \item \textsuperscript{52} \textit{Id.} at 85.
  \item \textsuperscript{53} 504 U.S. 719 (1992).
  \item \textsuperscript{54} \textit{Morgan}, 504 U.S. at 723.
\end{itemize}
should not be allowed to sit in capital trials. The State did claim, however, that it did not need to ask Morgan's question because other questions, inquiring whether jurors could be fair and impartial and whether they could "follow the law," were sufficient.\(^{55}\)

The United States Supreme Court rejected this argument. Justice White, speaking for the Court, first noted that while refusing to ask Morgan's adp question, the State did request questioning under \textit{Witherspoon} and \textit{Witt} to identify jurors who would never impose the death penalty.\(^{56}\) Clearly, Justice White concluded, Illinois was more eager to identify jurors who would never impose the death penalty than to identify jurors who would automatically impose the death penalty. Justice White also disputed the State's contention that questioning whether jurors would "follow the law" was sufficient to identify bias. "\textit{Witherspoon} and its succeeding cases," he declared, "would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath."\(^{57}\) Thus, the Supreme Court held that a capital defendant is entitled to ask prospective jurors whether they would automatically vote for the death penalty if the defendant were found guilty.\(^{58}\)

The rationale behind the Court's decision was that a petitioner must be able to "exercise intelligently his complementary challenge for cause against those biased persons on the \textit{venire} who as jurors would unwaveringly impose death after a finding of guilt."\(^{59}\) The \textit{Morgan} Court continued by noting that "[a] defendant on trial for his life must be

\(^{55}\) \textit{Id.}\(^{56}\) \textit{Id. at} 734.\(^{57}\) \textit{Id.} at 734-35. \textit{See infra} notes 86-91 and accompanying text explaining that just as a question asking if jurors could "follow the law" is inadequate to assess jurors’ views on the imposition of capital punishment, a single question asking if a juror would automatically vote for the death penalty is similarly inadequate.\(^{58}\) \textit{Id. at} 739.\(^{59}\) \textit{Id. at} 733.
permitted on *voir dire* to ascertain whether his prospective jurors [would automatically impose the death penalty].” 60

In dissent, Justice Scalia61 argued that the Morgan majority used flawed logic in holding that adp jurors cannot sit on juries and that defendants have the right to probe for jurors' tendencies to automatically impose the death penalty. Specifically, Justice Scalia disagreed with the Court's rationale that an adp juror would be unwilling to consider any mitigating evidence and would thus be excludable for that reason. Justice Scalia argued that the legacy of cases extending from *Lockett v. Ohio* 62 did not require that jurors 63 must consider any mitigating evidence, but rather only that they must not be precluded from doing so. As such, under Justice Scalia's reasoning, a juror unwilling to consider mitigating evidence because of her adp status need not be excluded. 64

60. *Id.* at 735-36. The importance of the strength of the Court's language guaranteeing defendants the right to probe prospective jurors for their inclinations to automatically impose the death penalty should not be underestimated. In addition to utilizing phrases such as "exercise intelligently" and "ascertain," the Court also stated that a defendant has the right to "inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined [that they would impose the death penalty]." *Id.* at 736. *See infra* notes 115-17 and accompanying text explaining that a defendant must be afforded in depth *voir dire* questions in order to "intelligently" "ascertain" and "discern" which jurors would automatically impose the death penalty.

61. Justice Scalia was joined by Chief Justice Rehnquist and Justice Thomas.

62. 438 U.S. 586 (1978) (plurality opinion). In *Lockett* the Court held that jurors must not be precluded from considering any relevant mitigating evidence. *Id.* at 604.

63. Justice Scalia, in addition to citing a plethora of cases aimed at buttressing his conclusion that jurors need only be permitted to hear mitigating evidence, also cited cases in which judges were not compelled to consider mitigating evidence. *See Morgan,* 504 U.S. at 745 (Scalia, J., dissenting) (citing *Hitchcock v. Dugger,* 481 U.S. 393 (1987)). According to Justice Scalia, "[W]here the judge is the final sentencer we have held, not that he must consider mitigating evidence, but only that he may not, on legal grounds, refuse to consider it." *Id.* at 745 (Scalia, J., dissenting). This statement makes little sense. If a judge cannot refuse to consider mitigating evidence then, contrary to Justice Scalia's logic, he must consider such evidence. Justice Scalia's erroneous logic thus tends to belie his earlier argument that adp jurors need not consider mitigating evidence and hence can legitimately serve on capital juries. *See infra* note 64 explaining this point.
Even assuming adp jurors could legally be excluded, Justice Scalia continued, he saw no reason why such jurors should not "be identified by more general questions concerning fairness and willingness to follow the law." Finally, Justice Scalia claimed that expansive questions to eliminate adp jurors are not as necessary as questions to identify jurors who would never impose death. The reason for this, according to Justice Scalia, is that in a state like Illinois where unanimity is required for a death sentence to be imposed, "[a] single death penalty opponent can block [the death penalty], but 11 unwavering advocates cannot impose it." In other words, Justice Scalia argued that the unanimity

64. Although Justice Scalia is able to offer numerous quotes purporting to indicate that failure to consider mitigating evidence is not grounds for exclusion of prospective jurors, his quotations ignore the prevailing view that jurors are expected to be impartial. Moreover, Justice Scalia's argument violates the spirit of Lockett v. Ohio and its progeny. Lockett stands for the principle that jurors sit at the penalty phase to consider mitigating evidence; it states directly that a jury must "not be precluded from considering [mitigating evidence]." Lockett, 438 U.S. at 604. However, contrary to Justice Scalia's contention, impanelling jurors who would automatically vote for death in effect precludes them from considering any mitigating evidence. If jurors need not consider mitigating evidence, then what would be the point of the Court's many decisions mandating that mitigating evidence may not be excluded from capital sentencing proceedings? No doubt, a hypothetical situation in which a state prohibited jurors from hearing mitigating evidence unless they requested to hear such evidence would not pass constitutional muster. As such, Justice Scalia's parallel contention that jurors need not consider mitigating evidence does not square with the Court's jurisprudence on this question.

65. Morgan, 504 U.S. at 748 (Scalia, J., dissenting). Justice Scalia's statement demonstrates a lack of awareness of the way jurors answer questions at voir dire and, more importantly, an ignorance of the existing social science data that indicates that vague questions such as "will you follow the law?" are gravely insufficient to identify and eliminate adp jurors. Justice Scalia's lack of concern for the existing social science data is not surprising given his judicial philosophy and his statements in earlier cases. Writing for the Court in Stanford v. Kentucky, 492 U.S. 361, 378 (1989), to uphold the constitutionality of the death penalty for 16- and 17-year-olds, Justice Scalia acerbically remarked that in legal battles "socioscientific, ethnioscientific, or even purely scientific evidence is not an available weapon." For a discussion of the recent lack of regard for empirical research in capital cases see James R. Acker, A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986-1989, 27 L. & SOC'Y REV. 65 (1993). See also Craig Haney & Deanna Dorman Logan, Broken Promise: The Supreme Court's Response to Social Science Research on Capital Punishment, 50 J. SOC. ISSUES 75 (1994); Shari Seidman Diamond & Jonathan D. Casper, Empirical Evidence and the Death Penalty: Past and Future, 50 J. SOC. ISSUES 177 (1994).

66. Morgan, 504 U.S. at 750 (Scalia, J., dissenting).

67. Id. (Scalia, J., dissenting).
requirement in most death-penalty states enables a single juror's opposition to the death penalty in all cases to inhibit the other jurors from sentencing a defendant to death, while at the same time eleven adp jurors could not institute a death sentence because one single juror could stand in their way.68

II. THE PREVALENCE OF ADP JURORS: WHAT SOCIAL SCIENCE TELLS US

The prevalence of adp jurors has always been somewhat of a mystery. The first social science attempt to ascertain the percentage of people who would automatically impose the death penalty was undertaken by Kadane in 1984.69 Kadane found that one percent of the population was likely to be adp,70 indicating that only a fairly small percentage of society would automatically vote to impose the death penalty. Three years later, however, the publication of two studies raised serious doubts about the validity of this conclusion. A study by Nieses and Dillehay found that 24.1% of registered voters surveyed were classifiable as adp.71 In the same journal that published the Nieses and Dillehay study, research by Nietzel, Dillehay, and Himelein was also published.72 Although this research did not focus on adp’s, it did determine that, in the course of eighteen capital trials, 25.8% of removals for cause favorable to the defendant occurred because the prospective jurors were adp.73 Obviously, the findings of these two studies dif-

68. Justice Scalia's logic does not hold in the four states — Alabama, Delaware, Florida, and Indiana — where capital juries recommend sentences. See infra text accompanying notes 119-28 explaining how a single adp juror can potentially affect the outcome of a sentencing decision in these four “recommending states.”


70. Id. at 116.


73. Id. at 73. The 18 capital trials occurred in Kentucky, South Carolina, and California.
ferred markedly from the Kadane study; the two new studies seemed to indicate that adp's were extremely prevalent in society. Moreover, this conclusion was buttressed by a 1983 Harris survey that found twenty-seven percent of the respondents to be adp.74

Any consensus within the social science community that the prevalence of adp's was in the mid-twenty-percent range instead of the one- to two-percent range was dashed seven years later upon the publication of another adp study. In 1994, Haney and colleagues surveyed about five hundred California residents and determined that only 2.6% were adp.75 The Haney study suggested that the more recent high estimates of adp's were erroneous. However, on the heels of the Haney study, the most recent adp study by Dillehay and Sandys76 contrasted the preceding work and found the highest percentage of adp's to date. Dillehay and Sandys found that using the “prevent or substantially impair” language delineated in Wainwright v. Witt (prior to the advent of Morgan) failed to identify 42 individuals, 28.2% of the respondents, who were adp.77 Moreover, the study found that two other adp respondents were correctly identified by the Witt questions,78 thus bringing the total number of adp's to 44 in a sample of 148. The Dillehay and Sandys study therefore found that 29.7% of those surveyed were adp.

A consensus among these five studies is noticeably absent. Two studies indicate that the percentage of adp's is fairly low, perhaps no higher than one to three percent of the population.79 However, three of the studies place the prevalence of adp's significantly


77. Id. at 159.

78. Id. at 160.

79. See supra notes 69-70 and 75.
higher, anywhere from twenty-four percent to thirty percent. Although we certainly cannot conclude with certainty that twenty-four to thirty percent of the population is adp, we also cannot dismiss the possibility that so many adp's do in fact exist. This possibility appears more troubling when we consider that the existing limited voir dire questions used in Delaware are both ineffective and insufficient to eliminate adp's.

III. CAPITAL VOIR DIRE IN DELAWARE

Questioning of prospective jurors during voir dire is the attorney's primary opportunity to detect bias. In Delaware, a number of questions are asked during voir dire.

80. See supra notes 71-73 and 76-78. Another large-scale study — The Capital Jury Project, a study of juror attitudes in 11 different states — though not specifically calculating adp percentages, did find an alarming rate of jurors predisposed to impose a penalty before any evidence had been heard at the penalty phase. See William J. Bowers & Benjamin D. Steiner, Choosing Life or Death: Sentencing Dynamics in Capital Cases, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 309 (James R. Acker et al. eds., 1998). The Capital Jury Project found that 48.3% of jurors thought that they knew what the appropriate punishment should be before hearing any evidence at the sentencing phase. Equally problematic was the fact that 64.1% of those respondents were "absolutely convinced" that they had determined the correct sentence prior to the sentencing phase. Id. at 325. For the purposes of this article it is also interesting to note that in one of the many capital jury studies, researchers found about 25% of jurors in the study believed that the death penalty was mandatory when in fact it was not. See James Luginbuhl & Julie Howe, Discretion in Capital Sentencing Instructions: Guided or Misguided?, 70 IND. L.J. 1161, 1173 (1995).

81. It is in fact possible that telephone surveys and interviews overestimate the percentage of adp's. However, while this is possible, it is equally plausible that the reverse effect occurs in actual voir dire situations. See Valerie P. Hans, Death by Jury, in CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES AT 153 (Kenneth C. Haas & James A. Inciardi, eds., 1988), noting that "[i]t is one matter to tell friends or an interviewer that one is for or against capital punishment, and another affair entirely to speculate in the formal setting of the courtroom about whether or not one could render a death sentence." The possibility exists that individuals are much more honest about their attitudes toward the death penalty when they are answering questions on the phone or face-to-face with a single interviewer, while they are much more reticent about revealing their pro-death-penalty predilections in front of a judge.

82. Although experienced practitioners are able to form conclusions about potential bias through questionnaire data, physical appearance, and body language, nearly all practitioners would agree that probing questions put to prospective jurors during jury selection provide the most insight into potential biases.
Unfortunately, these questions are both ineffective and insufficient to detect a prospective juror's inclination to automatically impose the death penalty. Consider the following hypothetical exchange between a trial judge and a prospective juror:83

Judge: Since one of the possible sentences in this case is death, we must know if you hold any view on capital punishment that would prevent you from performing your duty as a juror under the law. These questions are not meant to suggest what the verdict or sentencing recommendation should be in this case.84 The jury will determine the proper verdict based on the evidence presented in the trial and, if necessary, will also determine the proper sentencing recommendation in light of the facts and circumstances of the case. Do you have any bias or prejudice either for or against the state or the defendant?

Prospective Juror: No.

Judge: Is there any reason why you cannot give this case your undivided attention and render a fair and impartial verdict?

Prospective Juror: No.

Judge: Have you formed an opinion as to the guilt or innocence of the defendant in this case as a result of what you read or heard through the news media or discussed with anyone else?

Prospective Juror: No.

83. The questions excerpted in this example are the actual questions utilized in capital voir dire in Delaware.

84. Although the judge states that inquiring about capital punishment attitudes is not meant to suggest the verdict or the sentence, social science has demonstrated that it does. See Craig Haney, On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 LAW & HUM. BEHAV. 121 (1984). In a controlled study Professor Haney found that "exposure to death qualification increased subjects belief in the guilt of the defendant and their estimate that he would be convicted ... [a]nd it led the jurors to choose the death penalty as an appropriate punishment much more frequently than persons not exposed to it." Id. at 128-29.
Judge: Would anything you read or heard about this case through the news media or elsewhere make it difficult for you to render a fair and impartial decision in the case, based on the evidence introduced at the trial and the instructions given you by the Court?

Prospective Juror: No.

Judge: Do you have any religious, conscientious, or other opposition to the death penalty?85

Prospective Juror: No, I am not opposed to the death penalty.

Judge: Do you believe that anyone who is convicted of murder in the first degree should automatically be given the death penalty regardless of the presence of any mitigating circumstances and regardless of the Court's instructions on the law?

Prospective Juror: No, I would not automatically vote for the death penalty.

Judge: If you found the defendant guilty of murder in the first degree, would you automatically vote in favor of the sentence of death irrespective of the facts or the Court's instructions of law?

85. Should a prospective juror answer in the affirmative to this question, Delaware provides for four in-depth follow-up questions. Prospective jurors are asked:

Would your opinion, beliefs, or opposition to the death penalty prevent or substantially impair the performance of your duties as a juror to decide the facts impartially in accordance with your oath? Would your opinions, beliefs or opposition to the death penalty prevent or substantially impair the performance of your duties as a juror to conscientiously apply the law as charged by the court in accordance with your oath? Would you be able to recommend the death penalty at the end of the penalty hearing if the law and evidence so permits, regardless of your feelings regarding the death penalty? In spite of your opinions and beliefs regarding the death penalty, could you nevertheless recommend the death penalty at the end of the penalty hearing if the evidence so permits, knowing that such a determination could influence the Court in deciding what sentence to impose upon the defendant?
Prospective Juror: No. As I said before, I would not automatically vote for the death penalty.

Judge: Thank you very much. Do either the prosecution or the defense wish to use a peremptory challenge?

Prosecutor: No, your honor.

Defense: No, your honor.

Judge: You have been impaneled as a juror in this case.

Although the juror in this hypothetical situation claimed that she would not automatically vote for the death penalty, we cannot be sure, with any reasonable degree of certainty, that this is true. The reason for this is two-fold.

First, the judge began his address to the potential jurors by stating that “since one of the possible sentences in this case is death, we must know if you hold any view on capital punishment that would prevent you from performing your duty as a juror under the law.” This statement, either overtly or subconsciously, is a signal to prospective jurors that there are right and wrong answers to the questions that they are about to be asked. In essence, the judge’s statement suggests that should prospective jurors answer incorrectly there is something wrong with them. Thus, before any questions have even been asked, a social norm has been established whereby there are correct, socially acceptable answers to the forthcoming questions and incorrect answers that would stigmatize a prospective juror as unfit to perform the duties of a juror that all citizens are supposed to be able to perform.

The problem of the judge’s preliminary leading statement is compounded by the nature of the voir dire questions themselves. Even if prospective jurors do not implicitly believe that there are right and wrong answers after hearing the judge’s opening statement, they almost certainly will come to believe that there are right and wrong answers as they hear the subsequent questions. By the end of voir dire — the point at which the adp questions are asked — prospective jurors have already given a string of “no” answers if they have answered “correctly.” After having answered “no” to this series of questions, prospective jurors are, at the very least, predisposed to respond similarly and to continue
the string of “no” answers when they are asked if they are adp. Moreover, the questions about partiality and prejudice suggest that there is something wrong with being partial and prejudiced. Immediately following negative instructions about partiality and prejudice with questions about tendencies to automatically impose the death penalty effectively links the two ideas. As a result, prospective jurors are likely to perceive that being adp is “bad,” just like being partial or prejudiced is bad. As such, fearing social stigma, adp prospective jurors might be less willing to admit their desire to see all murderers punished by death because they believe that the court and those watching voir dire frown on such an opinion. Thus, some adp prospective jurors are likely to mask their feelings and make a simple “no” reply to the yes/no question about whether they would automatically impose death.

The second problem with Delaware’s voir dire questions in capital cases is that they are neither sufficient nor clear enough to cause some adp prospective jurors to realize that they are adp. Delaware’s adp question — Do you believe that anyone who is convicted of murder in the first degree should automatically be given the death penalty regardless of the presence of any mitigating circumstances and regardless of the Court’s instructions of law? — is so long-winded and vague that some adp prospective jurors confidently answer in the negative when, in actuality, they are in fact adp. Another

86. Sometimes jurors either are not paying attention or simply do not comprehend the questions being posed to them. In both types of situations, after having answered “no” to a string of questions it is highly possible that prospective jurors will continue to answer “no” simply because they did not listen to the question being asked to them or because they did not understand the questions and they were too embarrassed to request clarification.

87. See supra note 81 discussing how it is much easier for individuals to acknowledge their feelings about the death penalty in a phone survey or an interview than in a formal courtroom setting.

88. See Valerie P. Hans, The Conduct of Voir Dire: A Psychological Analysis, 11 JUST. SYST. J. 40, 55 (1986). Professor Hans notes that “A yes/no format often results in the development of automatic patterns of response. Particularly if socially appropriate answers are obvious, such responses tell us little about respondents’ attitude.” Professor Hans laments the usage solely of yes/no questions because of their failure to uncover prospective jurors’ biases. A better method, she argues, would be to intersperse close-ended and open-ended questions.

89. Cf. Luginbuhl & Howe, supra note 80, at 1169 noting that “capital instructions also typically use complex language, unfamiliar words, one-sentence definitions of terms, and many sentences with multiple negatives.” It is no wonder then that jurors are frequently confused about many difficult concepts, ranging from death and life qualification to weighing aggravating and mitigating circumstances, that they are compelled to face in capital cases.
hypothetical example helps to illustrate this situation. Under the Delaware questioning system, judges ask prospective jurors yes/no adp questions in this kind of exchange:

Judge: Do you believe that anyone who is convicted of murder in the first degree should automatically be given the death penalty regardless of the presence of any mitigating circumstances and regardless of the court's instructions on the law?

Prospective Juror: No.

Judge: If you found the defendant guilty of murder in the first degree, would you automatically vote in favor of a sentence of death irrespective of the facts or the court's instructions of law?

Prospective Juror: No, I would not.

Using the Delaware questions as they now exist does not elicit any identification of bias from this prospective juror. However, consider what might happen if one open-ended and more probing question were interspersed with the close-ended questions that are already used.

Judge: Do you believe that anyone who is convicted of murder in the first degree should automatically be given the death penalty regardless of the presence of any mitigating circumstances and regardless of the Court's instructions on the law?

Prospective Juror: No.

Judge: Okay, you have said that you would never automatically impose a death sentence. How would you determine whether or not a defendant should be sentenced to death?

Prospective Juror: Well, I believe in capital punishment. I think that if you take a life then you deserve to give up your life. There are exceptions of course. If the person had to kill in self-defense then I wouldn't vote for the
death penalty. But, unless the situation were something like that, then I
think murderers should be executed.

Judge: Let me understand your views on the death penalty. Are you saying
that if a person is convicted of first degree murder then he should always be
sentenced to death?

Prospective Juror: No, if the person acted in self-defense then he doesn't
deserve the death penalty.

Judge: Well, if the jury found that an individual acted in self-defense then
he would not be found guilty of first degree murder. He might be found
guilty of a lesser charge, but not first degree murder.90 So, if a person were
convicted of first degree murder it is unlikely that self-defense would be
among the mitigating circumstances. If self-defense were not an aspect of
the case, would you automatically vote for the death penalty if the defend­
ant had been convicted of first degree murder?

Prospective Juror: Yes, I would have to say that I would.

Judge: Thank you for your time. I am going to excuse you from having to
serve as a juror in this case.

As this hypothetical example demonstrates, some prospective jurors who believe
that they would not automatically impose the death penalty would in fact do so after a
first degree murder conviction.91 By asking an open-ended question the court was able to

90. Self-defense can be a complete justification for what otherwise would be a criminal
action. As such, if a jury found that a defendant acted in self-defense it would acquit the defendant
of the homicide charge. See MODEL PENAL CODE § 3.04(1) "[T]he use of force upon or toward
another person is justifiable when the actor believes that such force is immediately necessary for
the purpose of protecting himself against the use of unlawful force by such other person on the
present occasion."
obtain additional information that revealed the prospective juror's bias. The prospective juror herself did not comprehend her bias and it was only with an open-ended question that the court was able to make an informed judgment to strike this prospective juror for cause.

The current questions used in Delaware to identify adp jurors fail on two counts. Coupled with the judge's preamble, these questions lead some jurors to give the "correct" answer that they are not adp although they are in fact inclined in that direction. Other jurors, although also adp's, erroneously believe themselves to be impartial because the questions posed to them are vague and close-ended, thus not forcing the prospective jurors to address their actual beliefs about the death penalty and their adp predilections.

IV. MANLEY V. STATE: THE DELAWARE SUPREME COURT'S MISSED OPPORTUNITY TO REMEDY CAPITAL VOIR DIRE

Despite the fact that Delaware's capital 92 voir dire is inadequate to expose some prospective juror's biases, the Delaware Supreme Court has been unwilling to mandate an expanded voir dire. Recently, in Manley v. State, 93 the Delaware Supreme Court was presented with a death-sentenced inmate's appeal that he was denied adequate voir dire.

91. Although self-defense would most likely not constitute a reason for leniency after a first degree murder conviction, such a situation is possible. It is plausible that a defendant would raise a self-defense claim in a murder trial. This claim could be rejected by the jury and the defendant could then be found guilty of first degree murder. At the sentencing phase, despite the fact that all the jurors voted for conviction, some may still harbor doubts that the defendant did in fact act in self-defense. As such, despite convicting the defendant of first degree murder, some jurors might be unwilling to vote for the death penalty because of the possibility that the defendant did actually act in self-defense. Such a situation is known as residual doubt and it is presumed by some scholars that this keeps many convicted first degree murderers from being sentenced to death. See William S. Geimer & Jonathan Amsterdam, Why Jurors Vote for Life or Death: Operative Factors in Ten Florida Death Penalty Cases, 15 Am. J. Crim. L. 1, 28 (1988) (noting that "the existence of some degree of doubt about the guilt of the accused was the most often recurring explanatory factor in the life recommendation cases studied").

92. It is not only capital practitioners who are faced with the difficult task of picking a jury under limited voir dire. In civil cases in Delaware voir dire is nearly nonexistent. A short questionnaire probes only a prospective juror's ties to law enforcement or insurance companies. In short, civil voir dire does not even attempt to ferret out biased individuals.

Glossing over the serious inadequacies of capital *voir dire* discussed in this article, the Delaware Supreme Court denied Manley's appeal and affirmed his death sentence. The Court's logic was severely flawed.

Michael Manley stood trial along with David Stevenson for the murder of Kristopher Heath. This crime began when Stevenson was arrested for fraudulent use of a credit card to purchase Macy's gift certificates. Stevenson was a Macy's employee at the time. After a number of continuances, Stevenson's trial was set for November 13, 1995. On that morning, Heath, set to be a witness in Stevenson's case, was murdered. Witnesses heard gunfire at approximately 7:40 a.m. Shortly after 8:00 a.m. police were on the scene and identified two suspects. After a chase, both Stevenson and his friend Manley were apprehended. One year to the day after Stevenson was supposed to have gone to trial on fraud charges, a jury returned a guilty verdict for first degree murder for both Stevenson and Manley. Having found the defendants guilty, the jury then proceeded to recommend a sentence. The jury split seven-to-five to recommend death for Manley and eight-to-four to recommend death for Stevenson. The trial judge subsequently sentenced both men to death.

The Delaware Supreme Court entertained a number of Manley's appellate arguments, including his claim that the Superior Court had erred in refusing his request for more expanded *voir dire*. Prior to jury selection, Manley had requested that the trial court ask more probing, open-ended questions to identify prospective jurors whose views on the death penalty would substantially impair their ability to recommend a life sentence. The trial court rejected this request and instead asked prospective jurors:

94. *Id.* at 646.
95. *Id.* at 647.
96. *Id.* at 648.
97. *Id.* at 649.
98. *Id.* at 651.
99. *Id.* at 646-47.
100. *Id.* at 647.
101. *Id.* at 653.
Do you believe that anyone who takes another person’s life automatically forfeits his right to live? In the event that the jury found either defendant guilty in this case of first degree murder, would you automatically vote in favor of the death penalty regardless of the presence of any mitigating circumstances and regardless of the Court’s instructions on the law? \(^{102}\)

The trial judge stated that no set script is used for jury selection and that if jurors’ responses to the initial questions merited further probing, more questions would be asked. \(^{103}\) The Delaware Supreme Court found no fault with the trial judge’s *voir dire* questioning. According to Justice Holland, writing for the Court, “The *voir dire* conducted by the Superior Court in Manley’s case was adequate for the trial judge to ascertain whether each prospective juror would be impartial.” \(^{104}\) The reason, according to Justice Holland, was that “the record reflects that when a prospective juror expressed a constitutionally unacceptable view in response to the life-qualified inquiry required by Morgan, the trial judge asked whether the juror could set that view aside, be impartial, and follow the court’s instructions on the law.” \(^{105}\) If the prospective juror could not be impartial he was excused for cause.

Clearly, this reasoning does not support the Delaware Supreme Court’s blanket statement that Manley’s *voir dire* was adequate for the trial judge “to ascertain whether each prospective juror would be impartial.” \(^{106}\) Rather, the trial court’s *voir dire* procedure may have identified biased prospective jurors who outrightly stated that they would automatically vote for the death penalty, but it in no way was able to identify those prospective jurors with latent biases who answered the simple yes/no question about automatic imposition of the death penalty in the negative. In short, *voir dire* in Manley’s case was able to identify some merciless jurors who would always vote for the death penalty, but it

\[^{102}\text{Id. at 653-54.}\]
\[^{103}\text{Id. at 654.}\]
\[^{104}\text{Id. at 655.}\]
\[^{105}\text{Id. at 654-55.}\]
\[^{106}\text{Id. at 655.}\]
certainly was not adequate for the trial judge "to ascertain whether each prospective juror would be impartial."107 Unfortunately, the trial court and the Delaware Supreme Court failed to take into account a prospective juror who initially answers the yes/no adp question "correctly" out of error, ignorance, or a desire not to give the Court the "wrong answer."108

The Delaware Supreme Court's interpretation of the necessary scope of \textit{voir dire} in \textit{Manley} was provincial. This was due in part to the \textit{Manley} Court's narrow reading of \textit{Morgan v. Illinois}. The \textit{Manley} Court interpreted \textit{Morgan} as if the Supreme Court had stated that life qualification only requires prospective jurors to be asked if they would automatically impose the death penalty. This, however, is not what the Supreme Court decided in \textit{Morgan}. In \textit{Morgan v. Illinois}, the Supreme Court made two things clear: First, the Supreme Court stated that adp jurors cannot lawfully sit on a jury.109 Second, the \textit{Morgan} Court held that a defendant could not be prohibited from asking prospective jurors if they would automatically vote for the death penalty should they convict him.110 The \textit{Morgan} Court never reached the question of how expansive \textit{voir dire} should be. Consequently, the Court has never held that one yes/no question is sufficient to identify adp jurors during \textit{voir dire}; it has merely held that defendants are entitled to ask that question.

As a result, the requisite scope of \textit{voir dire} is an open question. That said, there is a strong constitutional argument for the need for more expansive \textit{voir dire} questions in capital trials.

V. THE CONSTITUTIONAL BASIS FOR EXPANDED \textit{VOIR DIRE}

The hypothetical examples in Part III of this article make clear that adp prospective jurors can in fact slip through the cracks to sit on juries in capital cases. The question then becomes whether the possibility of adp jurors sitting on a capital jury is a significant enough concern to warrant a change in Delaware's \textit{voir dire} procedure in capi-

107. \textit{Id.} (emphasis added).

108. \textit{See supra} notes 86-91 and accompanying text.


110. \textit{Id.} at 739.
tal trials. After all, the Constitution does not promise a defendant a perfect trial, nor does it promise a perfect jury. Thus, some would argue that as long as attempts are made to impanel jurors who would “follow the law,” it is inconsequential if one or two adp jurors slip through the cracks and inevitably serve on a capital defendant’s jury. Moreover, proponents of limited voir dire might point out that the inverse possibility — that jurors who would never impose the death penalty (ndp jurors) would be impaneled — is an equally real and troubling likelihood. As such, there are risks that ndp as well as adp jurors might be impaneled and since neither situation can be remedied entirely, those opposed to expanded voir dire contend that we should not expend vast amounts of judicial resources to accomplish the limited task of keeping a small number of biased jurors off of the venire. Though these arguments may sound convincing, they are seriously flawed.

Even though it is usually correct to conclude that defendants are only entitled to an adequate trial, that logic does not easily extend to capital cases. Capital cases are marked by increased care for procedures and judicial scrutiny. In 1972, in Furman v. Georgia, the Supreme Court struck down all existing death-penalty statutes because they operated in an arbitrary, capricious, and discriminatory fashion. In 1976, in Gregg v. Georgia, the Court made clear that capital punishment, in and of itself, is constitutional. However, the Court mandated substantial procedural safeguards and an overarching substantive philosophy that because “death is different,” capital trials must be conducted in a much more careful manner than in the past. The Court’s two landmark decisions on capital punishment — Furman and Gregg — demonstrate a concern for fundamental fairness in capital trials that is absent from other contexts. The Supreme Court has never invalidated all existing burglary laws or made such a striking statement on the issue of life imprisonment. Only in dealing with capital punishment has the Court been so bold as to invalidate the laws of over thirty states. In short, “death is different.” The fact that death is different, then, implicitly suggests that capital voir dire should also be different. A “fair” voir dire, then, is not sufficient in capital cases; increased scrutiny is necessary.

Clearly, the Supreme Court agrees that capital voir dire is of substantial importance. The Court has concluded that those individuals who would never impose the death penalty as well as those who would automatically impose it are unfit to serve on a capital


In order to eliminate these prospective jurors, the Court has determined that questions must be asked to identify people's attitudes about capital punishment. The Supreme Court has decided, in Morgan v. Illinois,¹¹⁴ that defense counsel must be allowed to ask prospective jurors if they would automatically impose the death penalty. Morgan answered the narrow question of whether a defendant is entitled to ask jurors a single question about whether they would automatically vote for the death penalty; the Court was not asked to decide whether open-ended questions are required in capital voir dire. Thus, in solely mandating that defendants be allowed to ask a yes/no question about prospective jurors' adp status, the Supreme Court simply answered the narrow question presented to it. However, should the Court be asked in the future to consider whether a capital petitioner should be entitled to expanded voir dire, the justices should require a more thorough jury selection. The reason for this is that while the single question approved in Morgan is a good start toward eliminating adp jurors, it is, by itself, insufficient and ineffective. The single question approved in Morgan, and utilized by Delaware judges, allows adp jurors to slip through the cracks and onto a capital jury.

Because the adp question approved by the Court in Morgan allows adp's to be seated in the jury-box, it therefore does not square with the Morgan Court's reason for mandating the question in the first place. In other words, in Morgan, just as in Witherspoon and Witt, the Court mandated questioning to uncover prospective jurors' biases toward the death penalty. The adp questions were required because the Witherspoon line of cases held that biased individuals cannot sit on capital juries. Thus, the more important outcome of Witherspoon, Witt, and especially Morgan was not the specific language of the questions themselves that lower courts today utilize but, rather, the reason the questions were mandated in the first place. As such, it is not questions themselves that courts should be concerned about but, rather, whether these questions serve the purpose of the Witherspoon-Witt-Morgan line of cases: to eliminate biased individuals from the venire. Thus, the legacy of the Court's decision in Morgan should not be that the defense must be allowed to ask jurors whether they would automatically impose the death penalty. Rather, the legacy that should emanate from Morgan is that the defense is entitled to determine whether a prospective juror would automatically vote for death.

Language from the Morgan decision itself supports the contention that the defendant should be able to determine which prospective jurors are adp. In requiring that defendants be allowed to inquire about prospective jurors' propensity to automatically
impose the death penalty, the Court noted that "[w]e deal here with petitioner's ability to exercise *intelligently* his complementary challenge for cause against those biased persons on the *venire* who as jurors would unwaveringly impose death after a finding of guilt."\textsuperscript{115} A few paragraphs later the Court further stated that "[a] defendant on trial for his life must be permitted on *voir dire* to *ascertain* whether his prospective jurors function under [the] misconception [that they could 'follow the law' even though they would automatically vote for death]."\textsuperscript{116} The Court then noted that the petitioner in the instant case "was entitled, upon his request, to *inquiry discerning* those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty."\textsuperscript{117}

The language the Court used in *Morgan* is compelling. The Court did not simply state that Morgan was entitled to ask whether prospective jurors would automatically impose the death penalty. Rather, the Court stated that Morgan needed to be able to exercise his challenges for cause *intelligently*. In order for Morgan to do this, he needed to be entitled to *inquiry discerning* prospective jurors' views on the death penalty so that he could *ascertain* which prospective jurors were adp. This language is extremely forceful and provides the Court with a basis — should it hear another adp case — to move beyond the narrow holding in *Morgan* in order to provide defendants with the opportunity to ask multiple open-ended questions to probe for bias.

**VI. THE ADP PROBLEM IN DELAWARE: THE POTENTIAL EFFECTS OF INADEQUATE VOIR DIRE**

In the death-penalty states that provide for juries to sentence defendants, *voir dire* is an important tool used to impanel an impartial jury. In these states, open-ended *voir dire* questions designed to identify adp prospective jurors are crucial. However, perhaps surprisingly, the importance of open-ended questions is even greater in the four

\textsuperscript{115}Morgan, 504 U.S. at 733 (emphasis added).

\textsuperscript{116}Id. at 735-36 (emphasis added).

\textsuperscript{117}Id. at 736 (emphasis added).
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recommending states—Alabama, Delaware,$^{118}$ Florida, and Indiana—where juries only recommend sentences. In these states, a more in-depth *voir dire* may exclude one prospective *ad p* juror who would otherwise have served on a capital jury and thus effectively change the number of jurors voting for death. In turn, this might change the sentence eventually imposed by the judge. This is especially true in Delaware, as a hypothetical example will demonstrate.

In a capital murder trial, eleven impartial jurors are impaneled along with one *ad p* juror. Of the eleven impartial jurors, all of whom weigh the aggravating and mitigating circumstances with an open mind, six jurors vote for death and five vote for life imprisonment. Obviously, the *ad p* juror—the twelfth juror—votes for the death penalty, thus bringing the tally to seven-to-five in favor of death. In Delaware, judges typically defer to juries' recommendations$^{119}$ and in this case the judge may very well impose a sentence of death because a majority of the jury voted for the death penalty.$^{120}$

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118. Of all four of these states, open-ended questions have the best chance of success in Delaware because Delaware judges, when imposing sentences, seem to be the most responsive to the recommendations of the capital juries. *See infra* text accompanying note 121.

119. In some cases, however, Delaware judges have imposed life sentences even when a majority of the jury voted for death. Juries recommended the death penalty for Donald Simmons, Jose Rodriguez, John Watson, Arthur Dovan, and Luis Cabrera by votes of 10-2, 9-3, 8-4, 8-4 and 7-5, respectively, but trial judges nevertheless imposed life imprisonment. *See Church, supra* note 8, cataloging all of Delaware's capital cases since 1991.

120. Even though I have hypothesized that Delaware judges are more likely to impose the death penalty if a majority of the jury voted for death, it is important to note that this is not an empirical hypothesis. To the best of the author's knowledge, no empirical study has yet been done to determine whether there is a significant correlation between the number of jurors voting for the death penalty in a given case and the judge's decision to impose capital punishment. This type of study would undoubtedly be useful. In the absence of such a study, however, the possibility that a judge will be more likely to impose the death penalty when a majority of the jury recommends it is not foreclosed. Although it may only be coincidental that Delaware judges have failed to impose a death sentence when less than a majority of the jury recommends the death penalty, conventional wisdom suggests otherwise. Given the numerous capital trials during the last decade, it seems unlikely that coincidence would keep Delaware from joining the ranks of the other recommending states in which jury recommendations for life sentences have frequently been overturned by judges in favor of death sentences. *See infra* notes 122-24 and accompanying text discussing the numerous instances in which Alabama, Florida, and Indiana judges have imposed the death penalty after juries recommended life sentences.
Now consider what might have happened had the adp juror not been impaneled. The eleven impartial jurors still would have been seated and they again would have split six-to-five in favor of death. However, unlike the first example, this time the adp juror did not slip through the cracks. The defense was able to ask the prospective juror open-ended questions, the prospective juror's bias was uncovered, and he was subsequently excused for cause. In place of the adp juror, an impartial juror, who was able to weigh the aggravating and mitigating evidence, was impaneled. The impartial juror, then, after carefully considering the evidence, voted for life imprisonment, thus bringing the jury to an even six-to-six split over the punishment to be imposed. The elimination of the adp juror thus also eliminated a majority vote by the jury for the death penalty. In Delaware, judges have yet to use their override power to impose a death sentence when less than a majority of the jury has voted for death. In fact, in all three cases in which Delaware capital juries split six-to-six between recommending life sentences or the death penalty, the judges imposed life sentences. Accordingly, under this hypothesis, the judge in this hypothetical case is less likely to impose the death penalty. As a result, the elimination of one adp juror in this hypothetical example served to change the jury's sentencing vote and might have led a judge to impose a sentence of life imprisonment.

This hypothetical example is particularly relevant to Delaware. In Florida, judges frequently overrule juries' recommendations for life imprisonment in order to impose the death penalty; in fact, they have done so on over a hundred occasions. In Alabama, judges have imposed death nearly fifty times after a majority of a jury recommended that the punishment should be life imprisonment. Although with less frequency, judges in Indiana have also overruled juries' recommendations for life imprisonment in order to impose the death penalty. Of the four recommending states, only Delaware judges have

121. See Church, supra note 8, describing the cases of James Crowe, Antonio Taylor, and Charles Towbridge. Interestingly, Church notes that in Crowe's case, Judge Jerome O. Herlihy cited the jury's six-to-six split sentencing recommendation as a reason to impose life imprisonment.

122. See Radelet & Mello, supra note 7, at 196.


124. See Harris, 513 U.S. at 522 n.8 (Stevens, J., dissenting) (citing a memorandum from the Indiana Public Defender's Council).
declined to sentence a defendant to death when a jury has voted for life. However, when a majority of jurors have voted for the death penalty, even a slim majority, Delaware judges have sentenced defendants to death. Thus, at least in Delaware, the difference between a seven-to-five vote for the death penalty as opposed to a split decision or a majority vote for life imprisonment may be the difference between life and death. Justice Scalia, therefore, could not have been more wrong in his Morgan dissent when he stated that "[a] single death penalty opponent can block that punishment [the death penalty], but 11 unwavering advocates cannot impose it." Although Justice Scalia was making a reference to Illinois, one of the twenty-eight states where juries pronounce the final sentence in capital cases, his logic does not hold for the four recommending states, especially Delaware. If the assumption that Delaware judges base their sentencing decisions in large part on the recommendations of a majority of the jury is true, then eleven unwavering advocates can impose a death sentence. In fact, the votes of seven out of twelve jurors are sufficient in some cases to garner a death sentence for a defendant in Delaware. Thus, given Delaware judges’ track record of not imposing death sentences without a majority recommendation from the jury, if an adp juror is impaneled and the jury voted seven-to-five in favor of the death penalty, then that adp juror can arguably be seen as the final sentencer who single-handedly sent a defendant to death row. Clearly, such a situation is unacceptable and expanded voir dire is therefore necessary to avoid it.


126. Morgan, 504 U.S. at 750 (Scalia, J., dissenting).

127. Delaware judges have imposed the death penalty after eleven-to-one jury recommendations for death. See Steckel v. State, 711 A.2d 5 (Del. 1998); Jackson v. State, 643 A.2d 1360 (Del. 1994). This of course is not to suggest that those eleven-to-one juries were composed of "unwavering advocates" but, rather, to demonstrate that a single juror opposed to a death sentence cannot stop such a result.

128. See supra note 125.
VII. CONCLUSION

It is a basic principle of American law that appellate courts sit to answer the most narrow question posed to them. The United States Supreme Court is certainly no exception to this rule. In Morgan v. Illinois, the Court was only asked whether the defendant had the right to ask a single adp question; it thus remains an open question whether more expansive voir dire questioning can be mandated in capital cases in order to eliminate adps from the jury pool. Since Morgan, the United States Supreme Court has not heard another case about the need for more expansive voir dire in capital cases. However, the Delaware Supreme Court has heard such a case. In Manley v. State,129 the Delaware Supreme Court was confronted with the problem of adps and the inadequacy of capital voir dire in a case in which a defendant was sentenced to death by a judge following a seven-to-five jury vote for the death penalty. Unfortunately, the Delaware Supreme Court did not comprehend the importance an adp juror can potentially play in capital sentencing and the Court rejected Manley's contention that he had been denied adequate voir dire.130

The situation of inadequate capital voir dire therefore remains in Delaware. A single yes/no adp question continues to be the sole basis to determine whether a prospective juror would automatically vote for the death penalty. Despite social science studies indicating a potentially high percentage of adps and frequent situations in which adp

129. See supra notes 92-110 and accompanying text.

130. Since Manley, the defects in Delaware's capital voir dire have again been challenged. See State v. Wright, Cr. A. No. 1N91-04-1947R2 et al. (Del. Super. Sept. 28, 1998). Wright raised many of the same issues of inadequate voir dire that the Delaware Supreme Court had rejected in Manley. In Wright, however, the Superior Court was forced to contend with testimony provided by Dr. Valerie Hans, a nationally recognized jury expert and professor of criminal justice. Professor Hans noted five flaws in the voir dire process in Wright's case. First, the life-qualifying (adp) question was asked out of context. Second, the life-qualifying question was too long and complicated for jurors to comprehend. Third, instead of open-ended questions, yes/no questions were used and these questions were ineffective to discern prospective juror's views on the death penalty. Fourth, the phrase "intentional murder" was likely misunderstood by prospective jurors. Finally, the use of a single adp question failed to weed out jurors whose views about the death penalty would substantially impair their ability to recommend a life sentence. Id. at 30-34. Unfortunately, the Court dismissed Professor Hans' concerns as unfounded and determined that voir dire in Wright's case was not flawed.
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Jurors incorrectly answer the death-penalty questions posed to them, Delaware continues to utilize a minimalist and inadequate *voir dire* process. A court's failure to use open-ended questions to probe for prospective jurors' capital punishment opinions and biases is dangerous because it almost certainly allows adp jurors to be overlooked and placed in the jury-box. More problematic, though, is that this danger is intensified in Delaware, where a single adp juror may be the swing vote in a majority vote for the death penalty that might lead a judge to impose death. It is unfortunate that the Delaware Supreme Court has failed to realize the peril capital defendants face as a result of limited *voir dire*. It falls then to the United States Supreme Court to remedy this inadequacy by mandating that defendants be allowed to ask more probing, open-ended questions during capital *voir dire*.