Editor's note: opinion released September 6, 2000

SUPREME COURT OF LOUISIANA

No. 99-KA-0192

STATE OF LOUISIANA

Versus

ROBERT MILLER

On Appeal From the Nineteenth Judicial District Court
for the Parish of East Baton Rouge, Honorable Timothy E. Kelley, Judge

CALOGERO, Chief Justice, dissents.

I respectfully dissent from the majority opinion with regard to the reverse-*Witherspoon* challenges in the present case. I agree with the majority that the line-drawing in this type of case is very difficult. Nonetheless, the risk that the trial judge's denials of the defendant's challenges for cause might have "infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized." *Morgan v. Illinois*, 504 U.S. 719, 736 (1992) (internal quotations omitted).

The majority creates a slippery slope in granting the trial judge unbridled discretion during voir dire when ruling on challenges for cause in capital cases, and thus effectively overturns a long line of precedent established by this court. True, the trial judge is vested with broad discretion in ruling on challenges for cause, and such a ruling will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. *State v. Cross*, 93-1189, p.7 (La. 6/30/95), 658 So. 2d 683, 686-87. However, "a challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice or inability to render judgment according to the law may be reasonably implied." *State v. Hallal*, 557 So. 2d 1388, 1389-90 (La. 1990). I would find, for the reasons set forth below, that the trial judge abused his discretion

in failing to excuse for cause jurors Ronald Sheets and Marjorie Roy.

Contrary to the majority's reasoning, I find serious error in the trial judge's handling of the voir dire of Ronald Sheets. In *Morgan,* 504 U.S. at 729, the Supreme Court made clear that "part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." Furthermore, as the majority here recognizes, the defendant has the burden of establishing that the prospective juror's bias in favor of the death penalty would substantially impair the juror's willingness or ability to follow the law as instructed by the judge or to adhere to his or her oath as a juror. *Ante*, p. 14. Where the defendant is hindered in his ability to inquire into the juror's willingness to follow the law and to consider mitigating circumstances, the defendant's right to an impartial jury and a fundamentally fair trial is brought into serious question. Moreover, absent adequate voir dire, the trial judge cannot fulfill his responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence. *Morgan*, *supra*, at 729.

In this case, the majority acknowledges that the trial judge incorrectly sustained the State's objections to certain of defense counsel's questions of Mr. Sheets.[1] Notwithstanding its recognition of the trial judge's error, the majority dismisses any prejudicial effect of the error on the basis that defense counsel was not "totally barred from questioning the jurors on their willingness to consider mitigating circumstances

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[1] After Mr. Sheets stated that death rather than a life sentence is the appropriate penalty for a young man who attacks and kills a sixty-seven-year-old woman, defense counsel asked whether any evidence would make a difference to the juror if he were convinced that the defendant was guilty. The State's objection to the question was sustained. When Mr. Sheets stated that "in this case" he could not think of anything that would change his mind about the death penalty, defense counsel asked if that were so, "[e]ven though the judge tells you that -- that you would have to consider mitigating circumstances." Again the State successfully objected to defense counsel's inquiry. *See Ante*, pp. 16-17. Defense counsel's intent was clear. In response to an earlier State objection to this line of questioning, defense counsel argued that he was trying to show through his questions that Mr. Sheets was taking the position that, if the defendant were convicted of the crime, the juror would not consider mitigating evidence before imposing the death penalty.

and to consider a life sentence." *Ante*, p. 18. However, I am not so willing to ignore the fact that the defendant was effectively precluded from examining the prospective juror on the crux of the issue before us, that is, whether the juror could follow Louisiana law and consider mitigating circumstances before imposing sentence, rather than automatically voting for the death penalty should the defendant be found guilty. Here, the trial judge did not allow the defendant a sufficient opportunity to develop his inquiry into whether the juror will in good faith consider evidence of mitigating circumstances as the law requires. Consequently, the defendant was denied his right to an adequate voir dire so as to identify unqualified jurors.

Even though defense counsel was denied the opportunity during voir dire to develop fully his inquiry into the prospective juror's ability to follow the law, there is ample evidence in the record to establish that both Ronald Sheets and Marjorie Roy should have been excused for cause. This court has reversed several death penalty cases in which reverse-*Witherspoon* challenges were denied when answers to voir dire questions on the particular aggravating circumstances required disqualification.[2] Mr. Sheets's and Ms. Roy's answers fall squarely into the pattern found unacceptable in this line of cases.

This court has held that a potential juror who indicates that he will not consider a life sentence, but will instead automatically vote for the death penalty *under the particular factual circumstances of the case before him*, is subject to a challenge for

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[2]*See State v. Divers*, 94-0756 (La. 9/5/96), 681 So. 2d 320 (death penalty reversed because two jurors would not consider a life sentence when the particular case involved a premeditated murder); *State v. Maxie*, 93-2158 (La. 4/10/95), 653 So. 2d 526 (death penalty reversed because a juror would not consider a life sentence when the particular case involved a rape and murder); *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So. 2d 1278 (death penalty reversed where a venire member stated his opinion that death was appropriate sentence for a double murder, even though he also stated he could perform his duties according to the judge's instructions); *State v. Ross*, 623 So 2d 643 (La.1993) (first degree murder conviction reversed because a venire member said he could "consider" both the death penalty and life imprisonment, but "personally" would "vote" for capital punishment as "the only penalty in a murder trial").

cause. *State v. Maxie*, 93-2158, p. 23 (La. 4/10/95), 653 So. 2d 526, 538; *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So. 2d 1278, 1284. Mr. Sheets's voir dire answers as a whole indicate that *in this case* he would not have considered a life sentence if the defendant were to be found guilty of first degree murder. When defense counsel asked Mr. Sheets for some example of what he would consider or what would influence him to lean toward life in prison rather than the death penalty, Mr. Sheets responded:

> Well, in this particular situation it would be kind of hard, you know, for a young man of his age to attack an elderly woman 67 years old. I can't-I can't see why or how anybody can even do anything of that nature. So, like I say, it would-I can't think of any kind of situation to tell you, you know, he deserves life over the death penalty, you know in a situation like this. You know, I can't come up with an example.

Additionally, when defense counsel later asked Mr. Sheets if he could think of anything that would change his mind about the death penalty, in this case, where a young man killed a sixty-seven-year-old woman, Mr. Sheets responded, "In this case, no sir."

The majority in upholding the trial judge's refusal to excuse the juror for cause pinpoints an earlier response where Mr. Sheets said that he could consider a life sentence if the defendant were to be found guilty of first degree murder and that he would not automatically give him death. But, as we have repeatedly cautioned, neither the trial judge nor the reviewing court should focus on one "correct" statement made by a juror during the voir dire; rather, the court should look at the totality of the juror's responses before determining the juror's fitness. *State v. Lee,* 559 So. 2d 1310, 1318 La. 1990). While at some theoretical level Mr. Sheets could consider mitigating evidence and a life sentence in a capital case, he surely could not do so in this case. *See Maxie*, 93-2158, p. 23, 653 So. 2d at 538; *Robertson*, 92-2660, 630 So. 2d at 1284. Consequently, the trial court abused its discretion in failing to excuse Mr. Sheets for cause.

Marjorie Roy should also have been excused for cause. The trial judge committed "reversible error by failing to excuse a juror whose 'personal opinion' was that the death penalty should be the only penalty for first degree murder, even though the juror claimed [s]he could consider both penalties." *State v. Divers*, 94-0756, p.13 (La. 9/5/96), 681 So. 2d 320, 327 (citing *State v. Ross*, 623 So. 2d 643, 644 (La. 1993)). During voir dire, Ms. Roy indicated that she believed in the death penalty and could return such a verdict. When the prosecutor asked Ms. Roy if her religious beliefs would interfere with her returning a death penalty, she responded, "No, sir. I believe like the bible said, an eye for an eye and a tooth for a tooth. If you take someone's life then your life should be taken also." The prosecutor then asked her if she could reserve judgment until she heard everything and could she fairly consider a life sentence, to which she replied "yes." However, when she was informed by defense counsel that the law in Louisiana does not provide for an automatic death penalty if the person is found guilty, she responded, "I understand. That is just my opinion," referring to her earlier eye-for-an-eye response.

Additionally, when defense counsel asked Ms. Roy if she would "automatically vote for the death penalty" if the jury did in fact return a guilty verdict, she responded, "Probably." Defense counsel further questioned, "[y]ou said probably," to which she responded, "Yes, sir." Moreover, at the end of the questioning when she was asked about whether she could vote to impose life imprisonment, she said that she was not sure that she could, because the victim did not get a second chance. Ms. Roy was never rehabilitated following this response, and should have been excused for cause. *See State v. Cross*, 93-1189, p. 8, 658 So. 2d at 687.

However, it is not just the lack of rehabilitation on this question, but it is the totality of the voir dire responses Ms. Roy provided, for which she should have been

excluded for cause. Ms. Roy never abandoned her opinion that the only appropriate sentence for a person guilty of murder was the death sentence. The learned trial judge should have recognized that, based upon the totality of her responses during voir dire, Ms. Roy's views on the imposition of the death penalty substantially impaired her ability to follow the law as provided under Louisiana's capital sentencing scheme.

For the foregoing reasons, I dissent from the majority opinion.